AMERICAN BAR ASSOCIATION JOVRNAL

DECEMBER 1940

SUPREME COURT BUILDING, WASHINGTON

Nobody Likes Uncertainty

ANY BUSINESS, small or large, must add each year a sufficient sum to its operating costs to provide for "usual" loss. But only to an uncertain extent can even that "usual" loss be controlled. Just one "unusual" loss may cause immediate impairment of credit if not complete business failure.

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CURRENT EVENTS

Committee on National Defense

The Committee has opened Washington headquarters at Room 1002, Hill Building, No. 839 17th St., N. W. Chairman Beckwith may be reached there, or at his New York City office, 20 Exchange Place.

Coordination

THE mainspring of this Committee's action is to help by every available means to make fully effective in the public service and for the national defense the skill and resources of the legal profession. The Committee is a clearing house of plans and information, a means of liaison between other working agencies; and if it can make original contributions along the way, so much the better.

From its headquarters in the Hill Building, Washington, the Committee is in touch with the sections and other committees of the Association which are directly concerned with the work of defense. It is corresponding with state and local associations and finding ways to make contact with individual lawyers not enrolled in any professional group. It tenders to the Bar generally its assistance in rendering to the country the organic professional service which every true lawyer in his heart desires to give.

Manual for Advisory Boards

In 1917-18 more than 119,000 lawyers served as original and associate members of what then were called "legal advisory boards" and today, although the beginning of Selective Service is much more gradual, some 20,000 have become members of the new "advisory boards for registrants". The Regulations require such boards to advise registrants and their dependents with regard to "questionnaires, claims, etc," but no general organization of the Bar has ever existed for the purpose of giving advice on all the problems which confront a man called up for training. Such problems affect a large number of the guardsmen and naval recruits who are already on active duty as well as the men who are yet to fill the quotas under the Selective Service Act, and they arise in every locality in the country.

To fill this gap the Committee issued on October 19 its "Memorandum No. 2", proposing a system of committees which should be collateral to the boards and adjusted to cooperate with other local facilities. More than 2,000 copies of this Memorandum have been called for by state and local bar associations for distribution through county groups and other channels. But organization alone, no matter how energetic or extensive, is not enough. The Committee has received many inquiries about the Regulations, the Relief Acts of 1918 and 1940, the little-known "Title VI of the Second Revenue Act of 1940" relating to life insurance for men in service, and many other points in this specialized field. Individual lawyers everywhere have been expected to ferret out for themselves a mass of information for which only a great library and much leisure would suffice. In order to equip itself to render a gratuitous public service the Bar is struggling under a fantastic handicap resulting from the lack of any adequate compilation of the needed materials.

The Committee therefore assembled everything it could find, beginning with Reginald Heber Smith's "Legal Suggestions for Soldiers and Sailors" (1917), the handbooks issued in that period by the Councils of Defense of several states, the files of this Association, the current work of numerous local ones, and the library of the Judge Advocate General of the Army. It offered to the proper authorities its services in compiling a Manual for Advisory Boards and it is happy to announce that its proposal was cordially received. With the brilliant assistance of Louis Fabricant and his staff at the New York Legal Aid Society the text has been completed. Efforts will be made promptly to clear it through the various bureaus and sections interested in the contents in order that it may be printed and sent through official channels to every board member. The work of the Bar, and its organization as well, should be greatly facilitated by this accomplishment.

Lawyers Called for Training

The Junior Bar Conference and many local committees are studying means of protecting the practice of lawyers entering the armed forces. In this and other subjects which concern both the interests of the Bar and the public morale the Committee desires to take an active part. Through its group of official advisors in the Departments it is often able to establish a community of interest and a means of effective action.

Plans for Broadcasting

By courtesy of the National Broadcasting Company a nation-wide network will be made available to the Committee about December 13 for an address to be delivered by President Lashly on the subject, "The Organization of the Legal Profession for National Defense". Notice of the exact time will be given through the press. Plans for a great number of local broadcasts on special aspects of the subject, in which state and local bar associations will be invited to participate, are making good progress.

EDMUND RUFFIN BECKWITH,
Chairman.

Governor Henry Horner

GOVERNOR HENRY HORNER of Illinois, a prominent member of the Association since 1914, and Governor of this state for nearly 8 years, died October 6, after a long illness. Prior to his election as Governor, he had been Probate Judge in Cook County (Chicago) for 18 years and was widely regarded as one of the outstanding judges of the entire county. While he was on the bench he was long active in the Chicago Bar Association and was one of the locally-famous members of the "troupe" which put on the annual Christmas "Follies" of that Association. His administration as Governor of Illinois is universally esteemed.

ABA Members Honored at Election

MEMBERS of the American Bar Association, many of them active in its work, were conspicuous in the 1940 elections as candidates of their political parties, in many states and localities throughout the land. The information is not yet available for a complete enumeration but the following are some of the well-known lawyers chosen for office.

United States Senate

In Vermont, Warren R. Austin, Republican, a member of the Association since 1912, was elected to the Senate.

In Florida, Senator Charles O. Andrews, Democrat, and member of the ABA since 1936, was reelected. In Maryland, Senator G. L. Radcliffe, Democrat, and ABA member since 1920 was also reelected. The late Senator Key Pittman, Democrat from Nevada, chairman of the influential Senate Foreign Relations Committee, was also reelected, but died suddenly a few days after the election. He had been a member of the Association since 1922. Senator Peter G. Gerry, Democrat, of Rhode Island, member of the ABA since 1928, was also reelected. An outstanding member of the Association since 1925, Senator Joseph C. O'Mahoney, Democrat, of Wyoming (whose address appears in this issue) was also reelected.

In Illinois, C. Wayland Brooks, Republican, a member of the ABA since 1932, was elected to the Senate for the balance of the term of the late Senator James Hamilton Lewis. In Maine, ex-Governor Ralph O. Brewster, Republican, was elected to the Senate. In Ohio, Mayor Harold H. Burton of Cleveland, a member of the ABA since 1924, who so cordially welcomed the 1938 Convention to Cleveland, was elected as Republican candidate to the Senate.

State Governors

In Missouri, Forrest C. Donnell, of St. Louis, member of the Association since 1911 and active member of various of its committees from time to time, was elected Governor, on the Republican ticket. Governor John W. Bricker, of Ohio, Republican, member of the Association since 1925, was reelected. As Attorney General of Ohio, Mr. Bricker addressed the 1937 mid-winter meeting held by the House of Delegates in Columbus. In Illinois, Dwight H. Green, member of the Association since 1928, was elected Governor. In Massachusetts, Attorney General Paul A. Dever, member of the Association since 1935 and a popular figure at the 1936 meeting in Boston, was defeated for Governor, on a close vote, with a contest indicated as possible.

Dinner to President Lashly

ON OCTOBER 30 the newly-elected President of the American Bar Association was given a testimonial dinner at the Jefferson Hotel, St. Louis, by the St. Louis Bar Association, the Missouri State Bar Association, and the St. Louis Chamber of Commerce.

Richmond C. Coburn of the St. Louis Bar, chairman of the dinner committee presented President Lashly with a silver desk set and introduced George C. Willson as toastmaster. A brief tribute of respect and esteem was spoken by Hon. Lloyd C. Stark, Governor of Missouri. U. S. District Judge Merrill E. Otis, of Kansas City, spoke on behalf of the bench and bar. His subject was "The Immutable Principles of Justice." He took his text from Powell v. Alabama from which he quoted the language of Mr. Justice Sutherland—"Denial of counsel in such a case violates those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." He quoted Lord Coke's memorable words spoken to the King—"I shall do that which doth become a judge." He reminded his audience that Coke made good that promise and referred to Lord Coke's opinion in Bonham's case. He concluded his earnest and eloquent speech with a protest against the use of the word "business" in relation to the work of the lawyer, saying: "Yes, it is a priesthood, not a business, not a trade. And you, sir chosen leader for a year of the lawyers of the greatest of all nations, are appointed high priest in the temple, temple built of old on the Holy Mount, high priest in a fateful hour."

Branch Rickey, vice president of the St. Louis Cardinals, spoke as a business man.

Mr. Lashly spoke briefly of the Association's new activity in national defense through a special committee, one member from each Federal Judicial Circuit, established in an office in Washington with its administrative staff and engaged in vital activities in connection with the selective service, social security, employment insurance, and other problems affecting the men called for military training. He also said that the primary goal of the organized bar could be expressed by the single word "justice"; that absence of that objective would make it impossible for the Nazi Germans to build an empire of long duration, or to assimilate the conquered hordes of Europe into a governable state; that it was the great task of the American Bar to dedicate themselves to the attainment of that goal and to stay on guard against the encroachments of alien philosophies.

Association of American Law Schools

THE annual meeting of the Association of American Law Schools will be held at the Edgewater Beach Hotel, Chicago, on December 27-30, 1940. The opening session, at ten o'clock, December 27, will hear the presidential address by Professor Edmund M. Morgan, of Harvard University Law School. Later at two o'clock of the same day, a symposium on Civil Liberties, under the chairmanship of Professor Harry Shulman, of the Yale Law School, will be held. Speakers at this meeting will be Hon. Francis Biddle, Solicitor General of the United States; Nathan Green, of the New York Bar; and Professors Herbert Wechsler, of Columbia Law School, and T. Richard Witmer, Yale Law School. During the meeting there will also be the usual round table conferences on various legal subjects.

At eight o'clock that night, the president of the American Bar Association, Hon. Jacob M. Lashly, will speak at a smoker.

The officers of the Association of American Law Schools, in addition to President Morgan, are: president-elect and secretary-treasurer. Harold Shepherd, professor of law, Duke University; members of the executive committee: William G. Hale, dean of the law school, University of Southern California; Hugh J. Fegan, professor of law, Georgetown University Law School; and F. D. G. Ribble, dean of the department of law, University of Virginia.

THOMAS C. LAVERY,
(Cincinnati) Secretary.

Annual Meeting of Referees' Association

THE JOURNAL is recently in receipt of the October number of the Journal of the National Association of Referees in Bankruptcy. That magazine is a quarterly published under the supervision of Herbert M. Bierce, Secretary, Winona, Minnesota. We compliment the Referees' Association on the attractive appearance of their Journal and on its interesting contents. The annual meeting of the Association was held in Chicago July 25, 26, 27. Among the speakers was Henry B. Chandler, of Washington, Director of the Administrative Office of the U. S. Courts.

THE ARGUMENT OF AN APPEAL*

By Hon. John W. Davis
of the New York City Bar

IF A LECTURE on the well worn subject assigned to me is to be given in this series, no one knows better than the Chairman of your Committee on Post-Admission Legal Education[1] that he and not I should be the person to give it. This is true in the first place because of the fact that in his lecture on Summary Judgment he has given the perfect example of what these lectures ought to be—informative, scholarly, helpful—and has set a standard which it is unfair to ask others to rival. And in the second place a discourse on the argument of an appeal would come with superior force from a judge who is in his judicial person the target and the trier of the argument than from a random archer like myself. Or, supposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on flycasting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views on the most effective methods of approach. For after all it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end.

I hope I may not be charged with levity or disrespect in adopting this piscatorial figure. I do not suggest any analogies between our reverent masters on the Bench and the finny tribe. God forbid! Let such conceits tempt the less respectful. Yet it is true, is it not, that in the argument of an appeal the advocate is angling, consciously and deliberately angling, for the judicial mind. Whatever tends to attract judicial favor to the advocate's claim is useful. Whatever repels it is useless or worse. The whole art of the advocate consists in choosing the one and avoiding the other. Why otherwise have argument at all?

I pause for definition. Argument, of course, may be written as well as oral, and under our modern American practice written argument has certainly become the most extended if not always the weightier of the two. As our colleague, Joseph H. Choate, Jr., recently remarked, "we have now reached the point where we file our arguments in writing and deliver our briefs orally." But it was not always so and in certain jurisdictions it is not so today. In England, for instance, where many, perhaps most cases are decided as soon as the argument is closed, counsel are not expected to speak with one strabismic eye upon the clock and the other on the court.

I recall that I once visited the chambers of the Privy Council in London hoping to hear a Canadian friend argue a Canadian appeal. When I arrived his adversary had the floor and was laboriously reading to the Court from the open volumes, page by page and line by line, the reported cases on which he relied. Said I to the Clerk, "How long has he been speaking and when will So-and-So come on?" "He has now been speaking," said the Clerk, "for six consecutive days and I doubt if he concludes today." I picked up my hat and sadly departed, realizing into what an alien atmosphere I had wandered.

In the old days, when not only courts but lawyers and litigants are reputed to have had more time at their disposal, similar feats were performed at the American Bar. It has been stated, for instance, that the arguments of Webster, Luther Martin and their colleagues in *McCulloch v. Maryland* consumed six days, while in the *Girard* will case Webster, Horace Binney and others, for ten whole days assailed the listening ears of the Court.

Those days have gone forever; and partly because of the increased tempo of our times, partly because of the increase of work in our appellate tribunals, the argument of an appeal, whether by voice or pen, is hedged about today by strict limitations of time and an increasing effort to provoke an economy of space. The rules of nearly every court give notice that there is a limit to what the judicial ear or the judicial eye is prepared to absorb. Sometimes the judges plead, sometimes they deplore, sometimes they command. The bar is continuously besought to speak with an eye on the clock and to write with a cramped pen.

Observing this duty of condensation and selection I propose tonight to direct my remarks primarily to the oral argument. I begin after the briefs have all been filed; timely filed of course, for in this matter lawyers are never, hardly ever, belated. I shall assume that these briefs are models of brevity, are properly indexed, and march with orderly logic from point to point; not too little nor yet too much on any topic, even though in a painful last moment of proof-reading many an appealing paragraph has been offered as a reluctant sacrifice on the altar of condensation.

I assume also that the briefs are not overlarded with long quotations from the reported opinions, no matter how pat they seem; nor over-crowded with citations designed it would seem to certify to the industry of the brief-maker rather than to fortify the argument. A horrible example of this latter fault crossed my desk within the month in a brief which, in addition to many statutes and text writers, cited by volume and page no less than 304 decided cases; a number calculated to discourage if not to disgust the most industrious judge.

I assume further that they are not defaced by *supras* or *infras* or by a multiplicity of footnotes which, save in the rare case where they are needed to elucidate the text, do nothing but distract the attention of the reader and interrupt the flow of reasoning. And I remark in passing that these are no more laudable in a judge's opinion than they are in a lawyer's brief.

I assume that there is not a pestilent "and/or" to be found in the brief from cover to cover; or if there is, that the court, jealous of our mother-tongue, will stamp upon the base intruder.

And finally I assume as of course that there has been no cheap effort to use variety in type to supply the emphasis that well constructed sentences should furnish for themselves. It may be taken as axiomatic that even judges, when they are so disposed, can read under-

*Address delivered before the Association of the Bar of the City of New York, October 22, 1940.

1. Hon. Bernard L. Shientag, Justice, Supreme Court, New York City.

standingly; and I should think that where the pages of a brief begin conversationally in small pica, nudge the reader's elbow with repeated italics, rise to a higher pitch with whole paragraphs of the text—not mere headings—in black letter, and finally shout in full capitals (and such have been observed), the judge might well consider that what was a well intentioned effort to attract his attention was in reality a reflection on his intelligence.

So it is with our briefs brought to this state of approximate perfection that we approach our oral argument. Much has been said pro and con as to the utility of this particular exercise. The appellate court which I most frequently encountered in my early days at the bar made no secret of the fact that it regarded the time spent in hearing cases as a sheer waste; and the announcement "Submitted on briefs" always won an approving nod from the bench. Fortunately, I think, that was an idiosyncrasy which has passed away even in that tribunal. There is much testimony, ancient and modern, for the contrary view.

Says Lord Coke, "No man alone with all his uttermost labors, nor all the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision; nor in court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right." Agreeing as we must with this pious sentiment, we lawyers sometimes think nevertheless that "God moves in a mysterious way, his wonders to perform." Judge Dillon in his lecture on the Laws and Jurisprudence of England and America, declares that as a judge he felt reasonably assured of his judgment where he had heard counsel, and a very diminished faith where the cause had not been orally argued, for says he, "Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the bar." Chief Justice Hughes is on record to the effect that "The desirability of a full exposition by oral argument in the highest court is not to be gainsaid. It is a great saving of the time of the court in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff." With all this most judges, I think, will agree, always provided that the oral argument is inspired as it should be with a single and sincere desire to be helpful to the Court.

Professing no special fitness for the task, I have ventured accordingly to frame a decalogue by which such arguments should be governed. There is no mystical significance in the number ten, although it has respectable precedent; and those who think the number short and who wish to add to the roll when I have finished, have my full permission to do so.

At the head of the list I place, where it belongs, the cardinal rule of all, namely:

(1) Change places (in your imagination of course) with the Court.

Courts of appeal are not filled by Demigods. Some members are learned, some less so. Some are keen and perspicacious, some have more plodding minds. In short, they are men and lawyers much like the rest of us. That they are honest, impartial, ready and eager to reach a correct conclusion must always be taken for granted. You may rightfully expect and you do expect nothing but fair treatment at their hands.

Yet those who sit in solemn array before you, whatever their merit, know nothing whatever of the controversy that brings you to them, and are not stimulated to interest in it by any feeling of friendship or dislike to anyone concerned. They are not moved as perhaps an advocate may be by any hope of reward or fear of punishment. They are simply being called upon for action in their appointed sphere. They are anxiously waiting to be supplied with what Mr. Justice Holmes called the "implements of decision." These by your presence you profess yourself ready to furnish. If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and in what order would you want the story told? How would you want the skein unravelled? What would make easier your approach to the true solution? These are questions the advocate must unsparingly put to himself. This is what I mean by changing places with the Court.

If you happen to know the mental habits of any particular judge, so much the better. To adapt yourself to his methods of reasoning is not artful, it is simply elementary psychology; as is also the maxim not to tire or irritate the mind you are seeking to persuade. And may I say in passing that there is no surer way to irritate the mind of any listener than to speak in so low a voice or with such indistinct articulation or in so monotonous a tone as to make the mere effort at hearing an unnecessary burden.

I proceed to Rule No. 2—

(2) State first the nature of the case and briefly its prior history.

Every Appellate Court has passing before it a long procession of cases that come from manifold and diverse fields of the law and human experience. Why not tell the Court at the outset to which of these fields its attention is about to be called? If the case involves the construction of a will, the settlement of a partnership, a constitutional question or whatever it may be, the judge is able as soon as the general topic is mentioned to call to his aid, consciously or unconsciously, his general knowledge and experience with that particular subject. It brings what is to follow into immediate focus. And then for the greater ease of the court in listening it is well to give at once the history of the case in so far as it bears on the court's jurisdiction. And sometimes there may be, I am not sure, a certain curiosity to know just whose judicial work it is that the court is called upon to review. For judges, like humbler men, judge each other as well as the law.

Next in order—

(3) State the facts.

If I were disposed to violate the rule I have previously announced against emphasis by typography, I would certainly employ at this point the largest capital type. For it cannot be too often emphasized that in an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself. A case well stated is a case far more than half argued. Yet how many advocates fail to realize that the ignorance of the court concerning the facts in the case is complete, even where its knowledge of the law may adequately satisfy the proverbial presumption. The court wants above all things to learn what are the facts which give rise to the call upon its energies; for in many, probably in most, cases when the facts are clear there is no great trouble about the law. *Ex facto oritur jus,* and no court ever forgets it.

No more courteous judge ever sat on any bench than the late Chief Justice White, but I shall never forget

a remark which he addressed to a distinguished lawyer, now dead, who was presenting an appeal from an order of the Interstate Commerce Commission. He had plunged headlong into a discussion of the powers of the Commission, and after he had talked for some twenty-five minutes, the Chief Justice leaned over and said in his blandest tone, "Now, Mr. So-and-So, won't you please tell us what this case is about. We could follow you so much better."

Of course there are statements and statements. No two men probably would adopt an identical method of approach. Uniformity is impossible, probably undesirable. Safe guides, however, are to be found in the three C's—chronology, candor and clarity: Chronology, because that is the natural way of telling any story, stringing the events on the chain of time just as all human life itself proceeds; candor, the telling of the worst as well as the best, since the court has the right to expect it, and since any lack of candor, real or apparent, will wholly destroy the most careful argument; and clarity, because that is the supreme virtue in any effort to communicate thought from man to man. It admits of no substitute. There is a sentence of Daniel Webster's which should be written on the walls of every law school, court room and law office: "The power of clear statement" said he, "is the great power at the bar." Purple passages can never supply its absence. And of course I must add that no statement of the facts can be considered as complete unless it has been so framed and delivered as to show forth the essential merit, in justice and in right of your client's cause.

(4) State next the applicable rules of law on which you rely.

If the statement of facts has been properly done the mind of the court will already have sensed the legal questions at issue, indeed they may have been hinted at as you proceed. These may be so elementary and well established that a mere allusion to them is sufficient. On the other hand, they may lie in the field of divided opinion where it is necessary to expound them at greater length and to dwell on the underlying reasons that support one or the other view. It may be that in these days of what is apparently waning health on the part of our old friend *Stare Decisis*, one can rely less than heretofore upon the assertion that the case at bar is governed by such-and-such a case, volume and page. Even the shadow of a long succession of governing cases may not be adequate shelter. In any event the advocate must be prepared to meet any challenge to the doctrine of the cases on which he relies and to support it by original reasoning. Barren citation is a broken reed. What virtue it retains can be left for the brief.

(5) Always "go for the jugular vein."

I do not know from what source I quote that phrase but it is of course familiar. Rufus Choate's expression was "the hub of the case." More often than not there is in every case a cardinal point around which lesser points revolve like planets around the sun, or even as dead moons around a planet; a central fortress which if strongly held will make the loss of all the outworks immaterial. The temptation is always present to "let no guilty point escape" in the hope that if one hook breaks another may hold. Yielding to this temptation is pardonable perhaps in a brief, of which the court may read as much or as little as it chooses. There minor points can be inserted to form "a moat defensive to a wall." But there is no time and rarely any occasion in oral argument for such diversions.

Underwood & Underwood

JOHN W. DAVIS

I think in this connection of one of the greatest lawyers, and probably the greatest case winner of our day, the late John G. Johnson of Philadelphia. He was a man of commanding physical presence and of an intellect equally robust. Before appellate courts he addressed himself customarily to but a single point, often speaking for not more than twenty minutes but with compelling force. When he had concluded it was difficult for his adversary to persuade the court that there was anything else worthy to be considered. This is the quintessence of the advocate's art.

(6) Rejoice when the Court asks questions.

And again I say unto you, rejoice! If the question does nothing more it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest. Moreover a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, and to dispel a doubt as soon as it arises. This you should be able to do if you know your case and have a sound position. If the question warrants a negative answer, do not fence with it but respond with a bold *thwertutnay*—which for the benefit of the illiterate I may explain as a term used in ancient pleading to signify a downright No. While if the answer is in the affirmative or calls for a concession the Court will be equally gratified to have the matter promptly disposed of. If you value your argumentative life do not evade or shuffle or postpone, no matter how embarrassing the question may be or how much it interrupts the thread of your argument. Nothing I should think would be more irritating to an inquiring court than to have refuge taken in the familiar evasion "I am coming to that" and then to have

the argument end with the promise unfulfilled. If you are really coming to it indicate what your answer will be when it is reached and never, never sit down until it is made.

Do not get into your head the idea that there is a deliberate design on the part of any judge to embarrass counsel by questions. His mind is seeking help, that is all, although it may well be that he calls for help before he really needs it. You remember Bacon's admonition on the subject in his Essay on Judicature:

> "It is no grace to a judge" he says, "first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions though pertinent."

On the other hand, Chief Justice Denison of the Supreme Court of Colorado puts the matter thus:

> "A perfect argument would need no interruption and a perfect Judge would never interrupt it; but we are not perfect. If the argument . . . discusses the truth of the first chapter of Genesis when the controlling issue is the constitutionality of a Tennessee statute it ought to be interrupted. . . It is the function of the Court to decide the case and to decide it properly. . . The Judge knows where his doubts lie, at which point he wishes to be enlightened; it is he whose mind at last must be made up, no one can do it for him, and he must take his own course of thought to accomplish it. Then he must sometimes interrupt."

Judges are sometimes more annoyed by each others' questions than counsel, I have observed. I remember a former Justice of the Supreme Court much given to interrogation, who engaged counsel in a long colloquy of question and answer at the very threshold of his argument. In a stage whisper audible within the bar Chief Justice White was heard to moan "I want to hear the argument." "So do I, damn him," growled his neighbor, Justice Holmes. Yet questions fairly put and frankly answered give to oral argument a vitality and spice that nothing else will supply.

(7) Read sparingly and only from necessity.

The eye is the window of the mind, and the speaker does not live who can long hold the attention of any audience without looking it in the face. There is something about a sheet of paper interposed between speaker and listener that walls off the mind of the latter as if it were boiler-plate. It obstructs the passage of thought as the lead plate bars the X-rays. I realize that I am taking just this risk at present, but this is not a speech or an argument, only, God save the mark, a lecture.

Of course where the case turns upon the language of a statute or the terms of a written instrument it is necessary that it should be read, always, if possible, with a copy in the hands of the court so that the eye of the court may supplement its ear. But the reading of lengthy extracts from the briefs or from reported cases or long excerpts from the testimony can only be described as a sheer waste of time. With this every appellate court of my acquaintance agrees. A sentence here or a sentence there, perhaps, if sufficiently pertinent and pithy, but not I beg of you print by the paragraph or page.

There is a cognate fault of which most of us from time to time are guilty. This arises when we are seeking to cite or distinguish other cases bearing on our claims and are tempted into a tedious recital of the facts in the cited case, not uncommonly prefaced by the somewhat awkward phrase "That was a case where," etc. Now the human mind is a pawky thing and must be held to its work and it is little wonder after three or four or half a dozen such recitals that not only are the recited facts forgotten but those in the case at bar become blurred and confused. What the advocate needs most of all is that his facts and his alone should stand out stark, simple, unique, clear.

(8) Avoid personalities.

This is a hard saying, especially when one's feelings are ruffled by a lower court or by opposing counsel, but none the less it is worthy of all acceptation, both in oral argument and in brief. I am not speaking merely of the laws of courtesy that must always govern an honorable profession, but rather of the sheer inutility of personalities as a method of argument in a judicial forum. Nor am I excluding proper comment on things that deserve reprobation. I am thinking psychologically again. It is all a question of keeping the mind of the court on the issues in hand without distraction from without.

One who criticizes unfairly or harshly the action of a lower court runs the risk of offending the quite understandable *esprit du corps* of the judicial body. Rhetorical denunciation of opposing litigants or witnesses may arouse a measure of sympathy for the persons so denounced. While controversies between counsel impose on the court the wholly unnecessary burden and annoyance of preserving order and maintaining the decorum of its proceedings. Such things can irritate, they can never persuade.

(9) Know your record from cover to cover.

This commandment might properly have headed the list for it is the *sine qua non* of all effective argument. You have now reached a point in the litigation where you can no longer hope to supply the want of preparation by lucky accidents or mental agility. You will encounter no more unexpected surprises. You have your last chance to win for your client. It is clear therefore that the field tactics of the trial table will no longer serve and the time has come for major strategy based upon an accurate knowledge of all that has occurred. At any moment you may be called on to correct some misstatement of your adversary and at any moment you may confront a question from the Court which, if you are able to answer by an apt reference to the record or with a firm reliance on a well-furnished memory, will increase the confidence with which the Court will listen to what else you may have to say. Many an argument otherwise admirable has been destroyed because of counsel's inability to make just such a response.

(10) Sit down.

This is the tenth and last commandment. In preparing for argument you will no doubt have made an outline carefully measured by the time at your command. The notes of it which you should have jotted down lie before you on the reading desk. When you have run through this outline and are satisfied that the court has fully grasped your contentions, what else is there left for you to do? You must be vain indeed to hope that by further speaking you can dragoon the Court into a prompt decision in your favor. The mere fact that you have an allotted time of one hour more or less does not constitute a contract with the Court to listen for that length of time. On the contrary, when you round out your argument and sit down before your time has expired, a benevolent smile overspreads the faces on the bench and a sigh of relief and gratification arises from your brethren at the bar who have been impatiently waiting for the moment when the angel might again trouble the waters of the healing pool and

permit them to step in. Earn these exhibitions of gratitude therefore whenever you decently can, and leave the rest to Zeus and his colleagues, that is to say, to the judges on high Olympus.

Before I obey this admonition myself, may I say, Mr. Chairman, how painfully conscious I am that I have offered nothing new concerning the subject in hand. I have not even been able to cover old thoughts with new varnish. How could I have hoped to do so? The process of appeal from one tribunal to another is very old in the history of human justice. No matter in what form it is carried on the essentials of an appeal are always the same, and there is nothing very new to be said about it. The need for an appellate process arises from the innate realization of mankind that the human intellect and human justice are frail at their best. It is necessary therefore to measure one man's mind against another in order to purge the final result, so far as may be, of all passion, prejudice or infirmity. It is the effort to realize the maximum of justice in human relations; and to keep firm and stable the foundations on which all ordered society rests. There is no field of nobler usefulness for the lawyer. For him, who in the splendid words of Chancellor D'Aguesseau, belongs to an order "as old as the magistracy, as noble as virtue, as necessary as justice."

As Others See Us

The following review of Dean Roscoe Pound's recent book, Contemporary Juristic Theory, *is taken from the October* 1940 *issue of* The Law Quarterly Review, *the leading law journal in England. It will be read with interest and satisfaction by American lawyers. Sir William Searle Holdsworth is the author of the famous "History of English Law," and is Vinerian Professor of Law at Oxford University. This review will be contrasted by many with the review of the same book in the November* JOURNAL *by Professor Karl N. Llewellyn.*

"This little book consists of three lectures delivered by Professor Pound at Claremont. The first lecture is entitled The Revival of Absolutism; the second, The Give-it-up Philosophies; the third, The Possibility of a Measure of Values. They are a very valuable summary of some of the theories and tendencies of modern juristic thought. In his first lecture Professor Pound gives some of the reasons for the revival of absolutism in modern times—one reason is 'the increasing paramountcy of the political organization of society as the agency of social control.' . . . This political theory has given rise to a corresponding juristic theory. According to that theory law is not a body of principles and rules settling human relations objectively and impartially. It is merely a collection of orders made by a Legislature, a Court, or an administrative official. In his second lecture Professor Pound shows how this tendency to juristic nihilism has been reinforced by changes both in scientific and philosophical thought. In scientific thought 'the growth of the idea of contingency in physics' has upset much political and juristic thinking. In philosophic thought Marx's conception of history 'eliminated the idea of *ought* as the idea unfolding in the historical development of political and legal institutions.' The result is the so-called realist school of jurists, which eliminates from law all idea of order and system, and leaves 'nothing but social control through officials enforcing or purporting to enforce the threats promulgated by the legal order.' Inevitably this realistic theory leads to absolutism. There are no such things as rights guaranteed by law. Ethics and law are wholly separate—'we have to do only with single items of behaviour,' and isolated decisions upon the problems raised by the behaviour of individuals. In his third lecture Professor Pound argues that though this new philosophy 'is telling us lawyers that we can't do what it is our job to do,' the lawyers are in fact doing it. They are arbitrating between competing interests, and, by a process of 'social engineering,' they are adjusting values in order to enable men to live together in civilized society with a minimum of friction and a minimum of waste of the goods of existence.

In a review which I wrote some years ago of Professor Pound's book on *Interpretations of Legal History* I said of his 'engineering interpretation' that it represented the point of view which from the earliest period English lawyers had always held, and that, because they have always held it, they made their legal system one of the great legal systems of the world. It would seem from these lectures that Professor Pound agrees with this thesis. But there are some legal and political theorists who do not agree with it, and do not recognize the value of the lawyer's work of social engineering. This dissatisfaction is due, Professor Pound thinks, to the fact that the procedure of the Courts has lagged behind the needs of the day. The remedy, he rightly thinks, is not 'a reversion to justice without law,' but a readjustment of the machinery of justice so as to fit in with the needs of modern society. In support of this thesis Professor Pound emphasizes the great things which the lawyers' work of social engineering has done in the past to promote civilization:

> It is idle to say that law is futile deception, is a myth, is a superstition, when we see how the work of the Roman juris-consults, . . . codified by Justinian in the sixth century, has served and serves today to adjust relations and order conduct in half of the world. . . .Equally it is idle to make such assertions when we see how experience of the administration of justice in the King's Courts in medieval England, . . . developed in the Courts in nineteenth-century England and America, could go round the world as the basis of a system of law for the English speaking peoples. . . .

In fact the lawyers have been able to do these great things because, though they have been influenced by philosophies of law and by logic, they have been taught by their close contact with the illogical facts of concrete cases to refuse to be mastered by them. They have, in their treatment of these philosophies, adopted the attitude which Burke in his *French Revolution* put into theoretical form:

> The pretended rights of these theorists are all extremes; and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of *middle*, incapable of definition, but not impossible to be discerned; the rights of men in governments are their advantages; and these are often in balances between differences of good; in compromises sometimes between good and evil, and sometimes, between evil and evil. Political reason is a computing principle; adding, subtracting, multiplying, and dividing, morally not metaphysically or mathematically, true moral denomination."

W. S. HOLDSWORTH.

INSURANCE FORUM

One of the outstanding events of the Philadelphia meeting was the so-called Insurance Forum which was presented at the second session of the Assembly. A summarized story of it appears at page 758 of the October JOURNAL. The addresses there given attracted such wide attention that it was decided to publish them in the JOURNAL. They are accordingly given below.

Address By Louis H. Pink (Excerpts)

THE growth of insurance from almost nothing a hundred years ago is one of the marvels of our business life. In our own state, the assets of the fire companies since the time of the establishment of our department in 1859 have multiplied a hundred times, and the assets of our life companies a thousandfold. There were no casualty companies when our department was organized. The premiums of insurance today aggregate something like six billion dollars; they are about equal to the taxes taken in by the Federal Government, but present indications are that taxes will soon outstrip insurance income. We have in this country more insurance than all the rest of the world combined, and those of us who supervise it in the various states have under our care some thirty billion dollars of the public's money.

The problem of state or federal regulation is not new. In the earliest times, there was no thought of it. When trouble arose and it seemed to be necessary to do something about regulating the companies, compelling them to file reports, seeing that they were solvent, naturally it was the state of domicile that took charge. . . .

I take it that today there is no need for a transfer from state to federal jurisdiction. If there were such a need, as perhaps there was some forty years ago, it existed before the Armstrong investigation, before that great work carried out by Charles Evans Hughes, as important to the institution of insurance as the Magna Carta is important to the liberties of the people. It gave a new concept to the entire institution and new thought; it cleansed it, made it a trustee. Since that time, management has improved, state supervision has improved; and there is nothing to indicate that a transfer of the jurisdiction from the states to that of the nation would be an improvement. . . . . There is no demand on the part of the policyholders who are so vitally affected, for a change from the supervision of the states to that of the nation. There is on the contrary, if I sense it correctly in my relations with the public, a fear of such transfer; there is apprehension that this great body of wealth belonging to the individual people of this nation may in some way be used for public or national purposes. . . .

In the period of depression through which we have just come, we have had our troubles, of course; but the number of insurance companies that failed was small when compared with other comparable financial institutions. The life companies that failed had only two per cent of the assets of all of the companies; and our department estimates that already the loss has been reduced to three-quarters of one per cent by payments, and will be substantially reduced in the future as liens are reduced by reinsuring companies. . . .

On the whole, the record of insurance through this depression is a remarkable one. It is a record in which those who supervise it and those who manage it, also the lawyers, who served the policyholders and the creditors and the state in trying to bring order out of this chaos, may justly take honorable pride. . . .

Granting that there is no present need for a transfer of jurisdiction, are there not some ways in which we can cooperate with the Federal Government to the advantage of the policyholders and the public? I think there are, and I think it is a mistake which we supervisors sometimes make to shun all contact with federal help because we fear that it may lead to something further. I think we have to take a more statesmanlike view, and that, where it is to the advantage of the public to cooperate with the Federal Government we should do so.

It is obvious, I think, that you cannot have federal supervision without also having state supervision. It is unthinkable that any one man or body in Washington could conduct matters in the forty-eight states, with the various local desires and needs, so as to give satisfaction. It would seem obvious that the states must retain a large measure of control even though the supervision of the interstate company goes to Washington; and if I were to answer that question, I think I would look to the north, to the experience of Canada where the Dominion examines for solvency the companies doing business in more than one province, and the provinces do everything else. They have there both Dominion and provincial supervision, and while we in this country have never had federal supervision, and it has always been in the states for over eighty years, in Canada there has been dual supervision in the Dominion and in the provinces for seventy years. . . .

But this problem is wider and more important than the mere efficiency of operation. In these times particularly, if we are to philosophize at all, we may look back to the early days of Colonial times, when the Constitution was up for adoption. The people of the Colonies undoubtedly feared the power of a centralized national government. They relied entirely upon the states for their personal liberties, trial by jury, freedom of the press, freedom of religion, the individual and human rights; and they feared that if a great central government were organized, it might interfere with these. . . . Our forefathers would indeed be amazed today if they could see the power and the influence which has been concentrated in the Federal Government. . . .

Federal Control of Insurance Opposed

The Federal Government should have all the power that is necessary to make America great and strong, and I believe, too in what we have been doing in this country to alleviate and do away with poverty and with sickness and with unemployment, so that we may have in this nation not mere technical or legal equality, but in fact equality among men. All the powers that are necessary to effectuate this I would give, but it does seem to me that in times like this when much power must be given, no unnecessary power should be transferred. As essential as it is to give that power which is required, is it essential to maintain on the other hand, the rights and the privileges, and the duties of the local governments, of the states, of the counties, the towns, and the cities. We must not give away more than we

have to give away to do the job. We must philosophize to the extent of realizing that efficiency is not everything. We want to be efficient, of course, but there are things that are greater than efficiency. Among these things are the preservation of our mode of life, the preservation of our rights and our liberties, and it seems to me that the transfer of this great institution of insurance at this time, when there is no need for it,—when the Federal Government is already probably the greatest and most powerful business corporation on the face of the earth—I can see no sense in it and, from the philosophical side, I can see a serious danger.

Address of J. Reuben Clark, Jr.

I HAVE been asked to say something to you today on the subject of Federal regulation of life insurance from the point of view of the policy holder. Freed from the restrictions and conventionalities which would bind me if I tried to come to you as a brother lawyer, a role to which I would not be equal, I may as an ordinary policy holder wander untethered over the whole field of Federal interferences, feeding here and there as my appetite and desire may prompt. I shall use my freedom freely.

The Stake of the Policy Holders

The life insurance companies of the United States have a great deal of the money of the policy holders, some say as much as $30,000,000,000, or say $460 per capita insured; they collect from us each year a lot more, perhaps $4,000,000,000, half of a fair-sized governmental annual budget. But to get the total income of the life insurance companies you must add about $2,000,000,000 to this, say $6,000,000,000 in all—a tidy sum for a needy administration; their need may be fathering a design. It is said that the average policy is about $1,700. Life insurance is not a rich man's game; it is the hope and reliance of us of modest means. The companies owe us policy holders an immense sum, it is said some $114,000,000,000.

There are quite a lot of us, maybe 65,000,000, almost 50% of our population. We are worth at least casual consideration by any man, even a young scantily-minded bureaucrat in Washington. We policy holders are a slow moving, slow thinking, slow acting outfit, but we might be as hard to stop, once on the way, as we are to get started. Once really started, the Juggernaut of Puri would be as a pigmy to a giant. To change the figure, we, like the mills of the gods, grind slowly, but we finally grind exceeding fine. In these purlieus, one might almost say: Politicians, take note.

The sums I have named show how great is the mere money stake we policy holders have in the insurance companies. For some of us, our premiums represent savings as against not only luxuries but even as against a full measure of comforts. A new coat, a new dress, a new pair of shoes, has time and again been sacrificed that Dad might pay his insurance premium. For this insurance is our certain, assured hope, our well-grounded reliance for food, clothing, shelter, and fuel for those whom we shall leave behind. Our insurance has been a family venture, every member contributing his share, from baby to grandmother. It is woven into the warp and woof of the family economy. It touches the very quick of family life,—our love for our wives and children—the holiest thing in life. So he who thinks to lay a hard hand upon all this should come to his task as one who stood in danger of polluting an altar.

State Control

We policy holders understand that the present security and certainty upon which we so much rely—rely upon it as much as we do upon death, as our premiums show—have grown to where they are, under the system of state direction, control, and regulation of insurance. As it has grown, insurance has had its diseases—every industry has whooping cough, chicken pox and measles. But the states have cured the disorders. Some other enterprises have had smallpox and plagues, and these have passed on. Insurance probably still has some distempers; but the people in the states will cure these as they have cured the others. We policy holders have no doubts about this, because we are the people who will do the nursing and curing; and we shall bring to our task all the tender solicitude and care, all the skill and wisdom, that we bestow upon the things which vitally affect the welfare and comfort of those we love.

There are certain fundamental considerations that are basic to our feelings on this question of state control. I will note some of them.

Inefficiency of Democracies

We are of the view that the so-called inefficiency of democracies, such as our own Republic, is evidence of their highest virtue, which is, a regulation of the civic, social, and economic life of the nation by the experience of all the people, crystallized into their mass wisdom. We know that this must mean a slow development, but we know also that it means a sure one; it means a slow correction of error and evils, because the mass are slow fully to sense or understand them; but it means a wise solution, because taken in accord with the common will and consent of the people; it means a support by the people of all measures taken to cure the evils, because they are the measures devised by the people; it means a slow adoption of new theories of economics, social system, and government, for we walk slowly and pick our way; but it also means fewer mistakes, fewer steps to retrace, fewer new ills and diseases to fight; it means a final adoption of the best. A democracy moves forward only so fast as the strength of the body politic will permit; the muscles and heart and digestive tract of the mass regulate the speed, either ahead or in reverse. We policy holders glory in all this care and deliberation; we know that if any change is to be made we shall make it; we do not need to watch anybody; we have a sense of security and stability that lets us sleep nights and work with joy and contentment in the day.

Wisdom of All the People

Personally, I have an abiding faith in the wisdom of all the people. I know that if all the people shall be brought to understand any problem concerning the common life of all, they will give the right answer. But I speak of all the people, and not of predatory groups at either end of the economic spectrum. These groups are a menace to democracy, and the larger the group, the greater the menace. Our national progress to this time has come from this common will and consent of all the people on all the great problems of our national life, for however we have differed on minor matters, we have heretofore agreed on all basic policies. No Re-

public can travel safely along any new and untried road against the will of a numerically great and insistent, if not angered, minority; when it does so, it moves into dangerous country. The rebound will be just as great as the forge ahead, and this, pushed to the last analysis, means civil commotion, even war. This fact gives us policy holders great anxiety over our present excursions into new economic and governmental fields.

We are alarmed, we policy holders, with the great swing in the outside world towards absolutism, because we see the same swing beginning here. In our nomenclature it is *Centralized Power versus Local Self-Government*. We see one sign of the swing here in this proposal for Federal regulation of insurance. That is one reason we are against it.

Common Law versus Civil Law

We policy holders do not need to tell you gentlemen that local self-government is basic to our whole legal system and juridical tradition. Whereas the great codes of the Civil Law—the Justinian Code and Code Napoleon—were framed in and issued from imperial courts and bore the imperial seal, the Common Law was evolved by the people through their recognized legislative bodies. In the Civil Law, the Emperor, the government, grants to the people the rights which he wishes them to have; the people go to the law to see what they may do; the residuum of power rests in the Emperor, the government. In the Common Law the people grant to their government the rights which the people wish the public officials, their servants, that is the government, to have; the people go to the law to see what they may not do, what they have prohibited themselves from doing; the residuum of power, as developed with us, rests with the people. Absolutism is able to thrive and always has been able to thrive under the Civil Law; the State can become all, the individual can be reduced to nothing, and this can be done in accordance with accepted legal principle. Absolutism cannot even live where the precepts of the Common Law are operative, for here the individual is all, the State is the mere servant of the body politic. Dictators love and cherish the Civil Law, and the human slavery they are able to set up under it; they hate and revile the Common Law, and the free institutions and liberties it creates and fosters for the benefit of the people.

Alien-Minded Bureaucrats

You gentlemen know too well that the whole drift in this country just now is towards the Civil Law as against the Common Law concept. Influential groups dominated with Civil Law theory and thought, groups in no small part made up of political emigres, traditioned and reared under the Civil Law and its concepts, are exercising a directive influence along Civil Law lines in our national affairs, foreign and domestic, that bodes ill for our free institutions. Unused to freedom, they are insensible to its blessings. They are unschooled in the restraint that a free society must exercise. Having no concept but that the ultimate power, the sovereignty, rests in government, which may grant or withhold or compel at its pleasure, they conceive no restraint upon the power of the Executive, and seek, and too frequently secure, the passage of legislation, national and state, wholly alien in spirit, even if it is passable in the letter, to the Common Law juridical concept and to our own Constitution.

As would be expected, this Civil Law system does not govern through local organizations, few and simple, set up by the people themselves, in their own localities, *responding to the needs and wishes of the people, as* under the Common Law; it governs through bureaus set up by and at the central government for its own purposes and to meet its own ends, which all too frequently is mere self-perpetuation in office and power. This is perhaps the basic part of the Civil Law system which thus far they are bringing to us. It permits the aims and wishes of the favored few (picked by the government) to dictate the planning and carrying out of all the social, economic, and governmental activities of the whole people. Bureaucrats act quickly upon the fleeting impulse; an ill is seen here, they pass a law to cure it. If the law does not cure, if they make a mistake, they try again and pass a new law; they reframe the regulations; they themselves have lost nothing, only the people suffer, their own perversions still live and multiply; they still hold their jobs; then when their own aims and wishes change, they prescribe for the people another course of legal medicine. But it is always the select, government-chosen few, not the people, who make the plans.

You gentlemen know better than we policy holders that our debauching legislative excursions of the recent past have not been born in the minds of our elected representatives, either in legislative or executive branches of government; you know, far better than we know how many have been mal-conceived in the minds of that increasing army of appointed bureaucrats that are dominating now our national life and beginning to rob the people of their inalienable rights and liberties.

Place of the Common People

The basic virtue of the Common Law system is that it not only permits, but it requires that the people shall make all plans for their governance and welfare through their representatives chosen for the purpose; of necessity such plans, when made, will aim to carry out what the people themselves wish, not what a government hand-picked, bookish, alien traditioned and taught, bureaucrat may wish. Under the *un*debauched Common Law system it is the people's wisdom that is brought to bear upon the people's problems, the wisdom of us common people tried and experienced in the every day affairs of life, us common people who work that we may live, us common people who are to live and prosper or to suffer and die under the measures to be enforced, us common people whose toil and sacrifice not only brought this nation into being but continue to maintain it, us common people who have brought forth, out of grievous travail, the greatest economic plenty and security for the whole mass, not the favored few, that has ever blessed the world. God bless the common people of this great land, and preserve them and their liberties and free institutions.

I have made these observations about government, not to enlighten you, for all this is your especial business, but so that you might know that we policy holders keep them in mind as having a vital bearing upon this proposal for Federal regulation of insurance.

Insurance Not Interstate Commerce

We policy holders understand that nearly seventy years ago, Mr. Justice Field, speaking for the whole Court, said: "Issuing a policy of insurance is not a transaction in commerce. . . Such contracts are not inter-State transactions, though the parties be domiciled in different States." (*Paul v. Virginia* (1868) 8 Wall 168, 183.) We also understand that some twenty years later, Mr. Justice McKenna also speaking for the whole Court, said, citing and quoting an earlier

case: *"The business of insurance is not commerce.* The contract of insurance is not *an instrumentality* of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference between insurance against fire and insurance against 'the perils of the sea' and we add or against the uncertainty of man's Mortality." (*New York Life Insurance Co. v. Cravens* (1900) 178 U. S. 389, 401). We understand that thirteen years later the matter was again considered by the Supreme Court, which in a divided opinion decided that it would not reverse "a long series of decisions where state legislation has been enacted in reliance thereon, and the reversal would involve the promulgation of a new rule of constitutional inhibition on state legislation necessitating readjustment of policy and laws." (*New York Life Ins. Co. v. Deer Lodge County* (1913) 231 U. S. 495.)

We understand that this states the law as it now stands, and that normally any proposed change might be submitted as an amendment to the Constitution. If the matter were to be submitted to the people as a Constitutional amendment, we feel we would be safe; we could defeat it.

But we cannot feel sure that the new court may not either plow through or around these cases, and then we fear we might be "off for a ride,"—for we can see that even Federal regulation could have far-reaching and injurious effects, not only to us policy holders, numerous as we are, but to the whole people. But our chief fear is this: That Federal regulation is but the preliminary step towards Federal insurance; it is the camel's nose thrust under the edge of the tent. We fear that Federal insurance is the real end aimed at and we are unalterably opposed to Federal insurance. There are many reasons for this. I will indicate some. I will state them in the extreme view, because in no other way may a fundamental change in our political life be safely examined. We must try to see the worst, to know whether the chance for something better is worth the gamble for the worst.

Source of Proposal for Change

To begin with, we policy holders are against both Federal regulation and Federal insurance, because we neither like nor trust the source from which the propaganda is coming—that alien traditioned and alien reared group—their aiders, abettors, and sympathizers—to whom I have already referred, who just now are, as reads the record in Job "going to and fro in the earth and walking up and down in it."

I speak of them as *Economic Panderers*, friends of absolutism. I use the term in a spirit of playful banter —the same playful banter that they use when they refer to you gentlemen who have gathered a reasonable amount of this world's goods, as *Economic Royalists*, and the same playful banter that they use when they refer to the rest of us who have saved a very little and wish to keep it, as *Economic Illiterates*. I mean no more than they, and most assuredly I mean no less.

We mistrust anything these friends of absolutism suggest to us, even though they be lodged in high places, and speak as an imperial bureaucracy.

Old Government Bureaucrat

I should in fairness like here to say a word about the old government bureaucrat. I want to clear him of any charge of malfeasance. He was an honest, industrious loyal, self-sacrificing, and self-effacing public servant. He was not a publicity hound; he never sought to double-cross his chief; he did not attempt *to make his hobby-horse into a government policy; he* did not seek to twist, pervert, *debauch, or destroy his* government; he did not make the government either a liar or a cheat; he never used the government to serve his own selfish ends or ambitions; he had an appreciation of what it meant to stand for tens of millions of people and did not seek to profit at their expense; his whole concern was the people's interest; he was not a hot-house sport or perversion, nurtured on fine-spun theories of government and property that have no place in American life; he was of and he represented, in thought and standards of life and morals, the common people; he believed literally that "a public office is a public trust," and he so ordered his life, private and official. I have known a lot of them. There are a few of them left. They are not generally of the new crop. I honor them for their faithfulness and sympathize with them for the trials and tribulations they have now to endure.

But to return: We are alarmed at the point the panderers urge for wishing a Federal jurisdiction to be set up; they call it "the scope of the investment activities" of the insurance companies.

Present Insurance Leadership

We policy holders do not know much about insurance, but we do know that if the companies maintain their ability to pay out to our beneficiaries, they must make good investments, the very best; we do know that by and large they have done so in the past and are still doing so; we do know that in the past and now their judgment has been generally good and their discretion as a rule wisely exercised; we do know that the officers of the company bear a fiduciary relationship to us policy holders which presses upon them with far more weight and a far keener responsibility than it would weigh upon any friend of absolutism in a government bureau; they have acted as high minded public servants. We have full trust in our present official insurance staff. If we are satisfied, whose business else is it? We do not feel the need of outside and gratuitous protection.

"Implications" from "Investment Activities"

So whenever any friend of absolutism begins to talk about the insurance company and "the scope of its investment activities," we policy holders are bound to be just a bit nervous.

Our anxiety is increased when in addition to this general theme of the "scope of investment activities," they also talk about "implications," this word is theirs, not mine, which might be spelled out from other situations, such as the control by the great companies of tremendous pools of capital and what the effect of the handling of these reservoirs might have upon the capital and security markets, and then how all this would react upon the national economy.

Of course all this is sketchy, is a bit mysterious and obscure, but it does sound ominous, because it clearly indicates that to their way of thinking the present situation and set-up should be changed.

The "Implications" of Control

When they talk vaguely and suspiciously of "the implications of control," they can hardly have in mind a mal-control, either dishonest or subversive to the general welfare. On this point we policy holders feel secure, because, as we understand it, the life insurance companies, after a most searching and frequently hostile investigation, have not been charged with any such mal-

control. True, in the past as everybody knows, the companies have harbored an occasional pirate, but they never found him at the same time a panderer, and they soon got rid of him. The criminal statutes that await the wrong-doer, plus public opinion, will take care of anything essentially wrong. We have no anxiety about the honesty and integrity of life insurance officials.

If it be a legitimate economic control that is under their ban, then we ask where would it be best in a Republic for that control to be—in the hands of private corporations, headed by civilians, all amenable to the law, all subject to a compulsory disgorging if they should steal or otherwise misappropriate our funds, all subject to criminal punishment for any crimes they might commit; or would that control better be in the hands of governmental agents, acting in the name of and for an unreachable—more or less—sovereignty, governmental agents backed (even in their unwisest actions which could sometimes be dishonest) by all the power of the Federal Government, with little if any disgorging possibilities or criminal punishments? We policy holders prefer as free citizens, and as policy holders also, the private control of the companies. We want to command the officers as our servants. We want to be able to reach those who mishandle our money. We want to put them in jail when they deserve it.

Pools of Capital

Then this allusion to these tremendous pools of capital, which grow, even as they talk, into great reservoirs. What do they mean by this? What is the implication here? This word *implication* is, I repeat, their word not mine; that is why I suspect what lies behind it.

We observe, in the first place, that now, under the existing system, there are many of these pools, not merely one pool. There is now a most efficient governor operating upon the present many pools, namely, the genuine competition existing among the companies for good business; this fact is not changed by the further fact that two or more companies may combine in certain pieces of business too large or too lucrative to be absorbed by one company. The self-interest of each company is the check and balance of the business. But if it be unwise as the *implication* is, to have so much capital in several pools, it must be, in a geometrical progression, increasingly unwise to have all this capital in one pool, as it would be under the Government. That effective governor, competition, would be completely ousted from his place. If size be the criterion of unwisdom, you do not reach wisdom by increasing the size.

Furthermore, one gets the impression—the implication—from their discussions and observations that they would convey the thought that the present *pools* or *reservoirs* are idle pools, that the people are not getting benefits from them, and by further inference that these pools ought to be put to work. We policy holders have understood that all these securities held by our companies represent actual capital that is now at work, and since such securities are bringing in dividends (if they were not the companies would not long hold them), then that capital must be now efficiently at work. If the idea is that these pools should be put to other or different work, then quite obviously to carry out this idea the securities must be sold and re-invested. We, even the most ignorant of us, perceive that the selling and re-investment of $30,000,000,000 worth of securities would be quite an operation. It is not difficult for us to understand that any government pool operator who was so minded, could see some powerful and even lucrative possibilities in this. This fructifying contingency is so great it shocks us.

Buying and Selling Securities

They make reference also to the effect upon the markets of the handling of all these securities. It seems clear that re-investment is in mind here. As we policy holders understand it, the present general effect of the insurance holdings on the security market is to maintain a good price for good securities, because the companies are always buying them at right prices, and, on the other hand, to depress the market on poor securities, because the companies would rarely or never buy them. Is either one of these results bad, either for the insurance companies or for the public?

I do not overlook that the insurance companies with the great funds at their disposal, could build a big market for a favorite company, and, possibly, injure a market for one disliked. But this is a species of dishonesty bringing such immediate disaster that it insures itself against itself. We understand that the investigation now under way has revealed no such condition among any of the companies.

Furthermore, may I repeat my testimony that, by and large, and personally I know of no exception, life insurance presidents are men of probity, integrity, and honesty, of high character and with a standing amongst the best, who know they are operating in a highly fiduciary capacity and who are meeting and observing their obligations and responsibilities.

A Government Capital Pool

Of course, we policy holders can see that if all the securities owned by all the companies were brought together into one pool, and that pool be in Government hands, for buying, selling and replacement, then those Government hands would hold in them the very existence of all the industrial life of the nation. Because the pool operators, with the assets of all the companies in one pool, could, if so minded, sell and depress securities even to the utter ruin of any given industry; they could, if so minded, buy and exalt, even to fabulous values, any favored institution. With such a power at their command it would take only a threat to sell any stock or bond, to the point of breaking the market on such stock and bond, to bring the most recalcitrant industrialist to his knees in complete submission to any government wish or desire. Every officer and every director of every essential industry in the Union whose stocks and bonds are in the life insurance portfolios would be at the mercy of the person who controlled this governmental pool, who had the say as to what should be sold and when and for how much, or who had the say as to what should be bought and where and for how much.

Furthermore, this governmental power and control could, by the selling of some securities and the buying in of others, in effect a mere exchange of securities, be so used as to add to their great governmental pool every other industry, not now in the portfolio, which these government operators might covetously wish to dominate. By the same power they could crush the life out of any industry they did not like. No essential industry would be safe from the pool operator's censorship and espionage; none could afford as a matter of life and death to incur his enmity; he must be pleased. These possibilities shock us, too. We know that no good can come from them.

We policy holders can see, also, what a real killing might be made by the stock broker "in the know," and

as purchases must be made through some stock or bond house, somebody would know.

We policy holders suppose that the relationship of insurance holdings to the whole national economy, of which they speak, comes in at this point, for quite obviously the government having in their hands all the selling and buying powers of these tremendous amounts of securities, could shape the national life to suit its wishes, could kill this industry, promote that, hamper a third, and create a fourth, and so to the end. That control is not free enterprise; that control is not a function of government under the Common Law system or the Constitution. It would be a debauching and a perverting of our government.

But in addition to our being troubled about the general welfare, to which the foregoing observations primarily relate, we are also troubled about our personal investments under such circumstances, for we want our investments carefully preserved. They are the funds that are to keep our families from want after we die.

Government Sale and Reinvestment

Now it is quite obvious that if our investments are to be safeguarded, certain securities must be sold when no longer profitable and others must be bought. This means there must be almost full latitude given to the operator of the government pool as to buying and selling, so that the value of the pool shall be preserved. But it is not clear to us how the discretion and judgment of the governmental operator could be brought under any real control. We do not see as a practical matter how Congress could take any hand in the matter of pool operations. Congressional debate could hardly be regarded either as a safe background or a safe guide for trading in securities. Furthermore, the judicial branch of government would seem to have no place in this trading picture, short of some actual malfeasance in office. So it looks to us as if all the things mentioned above could be actually brought to pass, both as affecting the national life, and as affecting us policy holders, without Congress or the judiciary having anything to say about it. That is, the policy holder would be left without any effective legislative or judicial protection against the hunch or whim of some appointive officer. This worries us.

Federal Insurance

Finally it looks to us policy holders as if most if not all of these things could be brought about by the assumption of a thorough-going federal regulation particularly if framed along the political and juridical lines that the friends of absolutism believe in, for their system knows no realm of enterprise and conduct that is free and beyond the reach of government, although such a realm is fundamental under our Constitution.

But as already stated we policy holders suspect—we have become suspicious over the years—that federal regulation, far reaching as that might be, is not the real end aimed at. We are fearful that the design is to take over life insurance as a federal activity. This would be directly along the line of other disrupting and perversive things that are now being done. We fear they want to cover into the Federal Treasury the $30,000,000,000 of life insurance assets the companies now have, cover them in either as securities or as cash, the securities being sold. However, having in mind the alluring power and control such a great pool of securities would give, we surmise the assets would be taken into the Treasury as securities and would be so held. This would be real money or its equivalent. Then, as Mr. Scherman has recently pointed out to them, they could by the scratch of a pen, albeit deceptive and faithless, further reduce the gold content of the dollar, and so add some $50,000,000,000 odd of easy money—a grand total of $80,000,000,000. With such a sum, our friends of absolutism could begin to carry out many more of their perverting schemes.

Government Life Policy Only a Claim

But we know that when the life insurance assets shall be covered into the Treasury, then we policy holders will have left only a claim against the Government,—the same kind of a claim that the statutory participators have under the so-called Social Security Act. Our claim would be no better, no worse than theirs. It would be just as good as a statutory promise could be, but we know and remember that all such promises are revocable at the will of Congress. The result would be that all of our savings, the fruit of all of our sacrifices, would be placed beyond the reach of the courts; we should lose all the security and certainty we now have; our wives and children would be at the mercy of shifting Congresses with changing aims, purposes, and interests. We policy holders would then be nothing but petitioning pensioners of the Government.

Ultra-Paternalism

How serious this might be upon our form of Government can be seen if you will add to us policy holders the dolers, the holders of so-called Social Security benefits, the old-age pensioners, the W.P.A.'s, the R.F.C.'s (for its borrowers are "on the Government" too) and all the rest who are eating out of the Government trough. Add us all together, I say, and almost the whole people of the United States would be dependent on government, not only for the protection of our lives, limbs, and property, which is the proper function of government, but for our very sustenance as well, which is clearly beyond the purpose and function of the government of a Republic. This is not our system.

I do not need to tell you gentlemen that this is paternalism in almost its last degree, and that, the people being brought to this point, our Republic must finally perish; the Federal Government will become everything, the individual nothing. Even God will be pushed out of His place, as He has been in nations now living which followed along this course.

No one I suppose will deny that the whole trend of our national course during the last seven years has been in the direction of increasing governmental control and direction over the lives of the people, and in fields never before invaded in this country. This much all must admit. I am not now speaking of the wisdom of this excursion.

"Realm of Anarchy"

Nor I suppose will any one deny that our Constitution as to this point interpreted, does set up a region of activity for its citizens into which government may not enter,—I am thinking principally of the Bill of Rights so-called, but there are other like rights inherent in other provisions of the Constitution.

The Civilians, the friends of absolutism, do not understand this principle of our Constitution, either in theory or practice; their lawyers call this unreachable domain of human action a "realm of anarchy"; and so it is to them because Government can not intrude there and prescribe. Under their system, government can reach anything and everything, for it is the source and repository of all sovereign powers.

Thus the issue to which our friends, the friends of absolutism, are forcing upon us is the adoption of the principles of the Civilian Codes where nothing is beyond government which may step in and control and direct down to the last minutia.

NRA Control

An invasion of this sacred realm of human rights was attempted by a frontal attack seven years ago, when the NRA was set up, the NRA that in the language of the Revelator, "causeth all, both small and great, rich and poor, free and bond, to receive a mark in their right hand, or in their foreheads; and no man might buy or sell, save he that had the mark or the name of the beast, or the number of his name." But NRA failed because it was set up under an alleged necessity that did not exist; it was conceived in falsehood. Industry escaped that trap largely because the trap was poor. Under that plan the courts could and did act notwithstanding the proponents of the plan are said to have aimed to keep the rightfulness and constitutionality of their cause away from the courts,—a course mighty near rebellion. At that time the real instrumentalities of control, the stocks and bonds of the companies remained in the hands of the private owners; these could be voted and used as the best interests of the owners seemed to suggest; opposition to government could be effective.

Control of Securities

Now the attack is to be upon the flank and the rear. That control and domination of our whole economic life which NRA aimed at, and sought, but failed to get, is now to be made certain through a control of the stocks and bonds of the basic industries; the Government is to secure these by confiscation or, if that be too harsh a term, by the appropriation of the assets of the life insurance companies, for these companies have, to be safe, already invested in the underlying securities of the underlying industries. Thus this control will reach, as I have already pointed out, every essential activity of the people; and, again as I have stated, under this plan, there will be no courts and even no Congress to protect us. For once these securities or their proceeds are covered into the Treasury of the United States, there will be no way to get any of these funds out of the Treasury except by a regular Congressional appropriation,—no way at least unless Congress abdicates or is thrown out. Industry can by this method be enslaved. And whenever communities or nations put themselves in a position where some one may, by the exercise of a recognized right, make them slaves, they are slaves.

If there were no insurance companies in this country, or if they were small and poor, or even if this were a question of establishing government insurance where no other insurance existed, the situation would not be so serious. In either of these events, there would be no great reservoirs of investments to be taken over, and played with by some operator, more or less the victim of political expediency, but merely a question, as in the so-called Social Security Act, of the gradual contribution of funds to be immediately used to meet expenses of government. And as at opposite ends of the earth are the two situations.

A Great Threat

Gentlemen, it is not easy to conjure a greater potential civic threat to our whole governmental, social, and economic system, than the regulation or absorption of the life insurance business by the Government; it could be the beginning of dictatorship and despotism.

Some one will say and say fairly, but you are assuming the worst possible men, driven by the lowest of civic morals, as the Government agents who would act as operators of these funds.

I admit this frankly. But does all history hold an example of the existence of an unholy power which was not seized and used by some civic demon?

Gentlemen, I ask your forgiveness for taking so much time to tell you things that you know far better than I. I do it (I say again) that you may know the lines along which we policy holders are thinking.

Lincoln Forecasts Danger

More than a hundred years ago Lincoln visioned a way in which could lie our downfall. He said:

"But it may be asked, 'Why suppose danger to our political institutions? Have we not preserved them for more than fifty years? And why may we not for fifty times as long?'

"We hope there is no sufficient reason. We hope all danger may be overcome ; but to conclude that no danger may ever arise would itself be extremely dangerous. There are now, and will hereafter be, many causes, dangerous in their tendency, which have not existed heretofore, and which are not too insignificant to merit attention. That our government should have been maintained in its original form, from its establishment until now, is not much to be wondered at. It had many props to support it through that period, which now are decayed and crumbled away. Through that period it was felt by all to be an undecided experiment; now it is understood to be a successful one. Then, all that sought celebrity and fame and distinction expected to find them in the success of that experiment. Their all was staked upon it; their destiny was inseparably linked with it. Their ambition aspired to display before an admiring world a practical demonstration of the truth of a proposition which had hitherto been considered at best no better than problematical—namely, the capability of a people to govern themselves. If they succeeded they were to be immortalized; their names were to be transferred to counties, and cities, and rivers, and mountains; and to be revered and sung, toasted through all time. If they failed, they were to be called knaves, and fools, and fanatics for a fleeting hour; then to sink and be forgotten. They succeeded. The experiment is successful, and thousands have won their deathless names in making it so. But the game is caught; and I believe it is true that with the catching end the pleasures of the chase. This field of glory is harvested, and the crop is already appropriated. But new reapers will arise, and they too will seek a field. It is to deny what the history of the world tells us is true, to suppose that men of ambition and talents will not continue to spring up amongst us. And when they do, they will as naturally seek the gratification of their ruling passion as others have done before them. The question then is, Can that gratification be found in supporting and maintaining an edifice that has been erected by others? Most certainly it cannot. Many great and good men, sufficiently qualified for any task they would undertake, may ever be found whose ambition would aspire to nothing beyond a seat in Congress, a gubernatorial or a presidential chair; but such belong not to the family of the lion, or the tribe of the eagle. What! Think you these places would satisfy an Alexander, a Caesar, or a Napoleon? Never! Towering genius disdains a beaten path. It seeks regions hitherto unexplored. It sees no distinc-

tion in adding story to story upon the monuments of fame erected to the memory of others. It denies that it is glory enough to serve under any chief. It scorns to tread in the footsteps of any predecessor, however illustrious. It thirsts and burns for distinction; and if possible, it will have it, whether at the expense of emancipating slaves or enslaving freemen. Is it unreasonable, then, to expect that some man possessed of the loftiest genius, coupled with ambition sufficient to push it to its utmost stretch, will at some time spring up among us? And when such an one does, it will require the people to be united with each other, attached to the government and laws, and generally intelligent, to successfully frustrate his designs.

"Distinction will be his paramount object, and although he would as willingly, perhaps more so, acquire it by doing good as harm, yet, that opportunity being past, and nothing left to be done in the way of building up, he would set boldly to the task of pulling down." So spoke Lincoln.

Destiny of America

Gentlemen, ours is a great country in wealth and man power but it is an infinitely greater country in the material and cultural blessings it has brought to its citizens, and in the divine gifts of liberty and free institutions which a kind Providence has bestowed upon us. We must not lose these. God expects us to preserve them.

I have a simple faith. It is that God Himself set up this Government of ours, that He inspired the writing of the Constitution, that His hand directed the setting up of this Government under the Constitution, that He set it up that we might be to the world an ensign of liberty and righteousness. My simple faith is that it is God's will that we shall carry on as He set us up, losing nothing of our free agency, nothing of our liberties, nothing of our free institutions; that God expects this nation of ours to follow the commandment given by the Master on the Mount, near the shores of Galilee: "Let your light so shine before men, that they may see your good works, and glorify your Father which is in heaven"; that it is God's intent, that we following this plan, other nations shall see our blessings and our righteousness, and so be led along with us, not by blood and conquest, but by free conversion, until the whole world shall come to a unity of liberty and freedom, and corrupt men and enslaving governments shall be driven from the earth. God grant to us that day of noble triumph.

Address of Hon. Joseph C. O' Mahoney

MY delay in arriving here made it possible for me to listen to the very excellent address which has just now been made by Mr. Clark, who is also from the Rocky Mountain Region. I know how sincerely that address has been made. I know that it proceeds from a depth of conviction which every person must honor and respect. I agree with him, to use the phrase which he himself used just a few moments ago, that it would be difficult to conjure up a greater threat to our free institutions than that which he described. Happily that threat has been merely conjured up; it does not exist.

Based upon assumption and upon suspicion and upon the attribution to the Temporary National Economic Committee and the Securities and Exchange Commission of ideas and concepts that were never entertained, it is indeed a picture to frighten the unwary. So I am happy that I have come to this meeting and to discuss with you not only the problem of insurance and government but also to make a few allusions to the deep, widespread problem of business and government which lies at the root of all of our difficulties.

Let me begin by making clear that neither the Temporary National Economic Committee nor any agency connected with it has ever recommended or suggested any legislation providing for federal regulation of insurance, and that in participating, at the invitation of your officers, in this symposium, I do not appear in any sense whatsoever as an advocate of federal regulation.

It is necessary for me to make this disclaimer because the country has been filled with rumors and reports, ever since the beginning of the study of insurance by the Temporary National Economic Committee, that the secret and hidden purpose of the whole proceeding was to lay the basis for some new law or laws cutting down the present power and authority of the states. As Chairman of the Temporary National Economic Committee, I have been obliged for more than a year to make denial of such purpose, but my voice, as evidenced this morning, has apparently never caught up with the rumors and I have no doubt that this symposium today is the result of the same current of misunderstanding which has attributed to this committee intentions it has never entertained.

As long ago as November 14, 1939, I wrote a letter to be read at a meeting of the Massachusetts Insurance Society in which I stated explicitly that "there isn't the slightest basis for the intimations appearing in certain insurance journals that the committee, or any member of its staff is promoting any scheme for government competition with the insurance industry."

Before sending that letter to Commissioner George E. Allen, of the District of Columbia, who was speaking to the Insurance Society of Massachusetts, I laid the letter before Mr. Leon Henderson, who was then the representative of the SEC upon the Temporary National Economic Committee and before Mr. Gesell, who was the attorney selected by the SEC to conduct the inquiry, and asked them explicitly whether or not I was incorrectly representing the attitude of the TNEC or of the SEC as they understood it and both of them agreed with the statement which I then made, and I so said in the letter which was read to the Massachusetts Society.

Denial in Senate

On February 1, 1940, on the floor of the Senate, in answer to an inquiry directed to me by Senator Byrnes of South Carolina "as to whether or not the Committee intends to recommend to the Congress that legislation be enacted providing for federal supervision of insurance or for some agency of the Government going into the insurance business," I stated explicitly, and I am quoting from the record: "I can say without reservation or qualification of any kind that the Committee has never met to consider recommendations with respect to insurance and no member of the Committee has ever suggested to the chairman that either of the policies

which the Senator has just mentioned should be adopted or that any recommendation of that character should be made."

These are only two of many similar statements which I have made but because of the persistence of the reports, I venture once again to declare, in the clearest and most emphatic terms, that the Temporary National Economic Committee has never entertained any proposal and the Securities and Exchange Commission and none of its staff has ever presented to the committee, in public or in private, any suggestion for federal regulation of insurance, for the institution of any plan of Government competition with any branch of the insurance industry or for any law respecting the agency system of selling insurance, and now I may add, as a result of what I have heard here this morning, or the establishment of any pool to take over the assets of the insurance companies or any suggestion of the faintest kind looking toward that end.

The interest of the Temporary National Economic Committee in the insurance industry has not proceeded from any desire to expand the power or authority of the Federal Government, but has resulted solely from its pursuance of the instructions which were laid upon it by the joint resolution which brought it into existence, to make a full and complete study of the concentration of economic power in and financial control over production and distribution of goods and services in order to determine the causes of such concentration and their effect upon competition.

There never has been the slightest cause for any misunderstanding of this purpose because in the message of President Roosevelt presented to Congress on April 29, 1938, urging this economic study, in the joint resolution which set up the Committee and in repeated statements by the chairman of the Committee, it has been made clear over and over again that the primary objective of the whole proceeding is the stimulation of our traditional system of free, private enterprise. Never was there greater need in the history of civilization than there is now for united action in defense of the system of private enterprise because it has never stood in greater danger than it stands now. With the leaders of the totalitarian states declaring their purpose to destroy both democracy and capitalism in words that cannot be misunderstood and by actions that are even more convincing, with practically all of Europe already subjected to their theory of political and economic government and with Great Britain beaten almost to its knees, certainly it must be clear to us that we cannot permit ourselves to give way to emotional misunderstanding or, I might even say, misrepresentation of the purposes of any agency or official of our Government with respect to the fundamentals of human freedom and the protection of free enterprise.

Free, Private Enterprise

I take the liberty, therefore, in this distinguished company of lawyers, to point out the specific proof of my statement that in its conception and in its whole procedure the Temporary National Economic Committee has devoted itself to the defense of free enterprise because I want no one to go out of this meeting without knowledge of this most important and fundamental fact.

Sometimes our capacity to understand facts and to see reality is inhibited and beclouded by subjective developments over which we have no control. I remember very well when I was a student at Columbia University in New York City, studying logic and philosophy, having an illustration from the instructor in my class who took us one day to the bank of the Hudson River. We were on the Manhattan side, and he pointed across the river to the other side and there, far away in the distance, was an animal, and he asked us to determine what that animal was. Some thought it was a bull and some a cow and some a horse. What we saw was the image that was created in our mind through the ability of our eyes to penetrate the distance between. We might have seen some horrid beast conjured up, to use the expression that was used this morning, by suspicion and assumption when, instead of a horrid beast, it was in fact a meek cow upon the other side of the river.

So I am calling your attention today to the words of President Roosevelt, cognizant of the fact that some there are who will not and cannot understand the implication of the words, perhaps because they choose not to, but in his message of April 29, 1938, urging an investigation of the concentration of economic power, President Roosevelt left no doubt of his purpose: "If you believe with me," said he, "in private initiative, you must acknowledge the right of well-managed small business to expect to make reasonable profits." And again he said: "But generally over the field of industry and finance we must revive and strengthen competition if we wish to preserve and make workable our traditional system of free, private enterprise."

I could quote many other extracts from this executive message but will content myself with the following sentence from the President's concluding description of the fundamental purpose of the study he was then recommending: "It is a program to preserve private enterprise for profit by keeping it free enough to be able to utilize all our resources of capital and labor at a profit."

As already indicated, the resolution which created the Committee placed special emphasis upon the necessity of maintaining competition or, in other words, private enterprise, and finally, as Chairman of the Committee, I have never lost an opportunity to state over and over again my deep conviction that the solution of the economic troubles of our people and of the world does not lie along the road of expanding Government activity or Government control over private enterprise, but upon the reduction of such control to a minimum and upon the stimulation and encouragement of free enterprise on the part of all our people.

A. B. A. Committee Recommends Regulation!

How does it come, therefore, that there should be so widespread a misunderstanding both of the purposes of this Committee and of the problem that confronts the world? A discussion of insurance and insurance law affords a convenient opportunity for suggesting the answer and I welcome the chance to participate here today. There could be no more appropriate forum in which to develop the subject than this, because, curiously enough, while the Temporary National Economic Committee has never suggested federal regulation of insurance, the American Bar Association Committee on Insurance Law has definitely done so and in times past it has been at great pains to prove that the business of insurance is in fact a part of interstate commerce and should be regarded as within the regulatory power of the federal Congress.

In 1905 the predecessors of the gentlemen who make up this Section on Insurance Law of the American Bar Association to whom I am now speaking, concluded a very exhaustive report with this clear declara-

tion, and I am now quoting from the Report of the Insurance Committee of the American Bar Association:

"Your committee therefore recommend:

"1. Legislation by Congress providing for the supervision of insurance.

"2. The repeal of all valued policy laws.

"3. A uniform fire policy, the terms of which shall be specifically defined.

"4. The repeal of all retaliatory tax laws."

And observe this fifth recommendation!

"5. Stricter incorporation laws in the several states as they affect the creation of insurance companies; and a federal statute prohibiting the use of the mails to all persons, associations or corporations transacting the business of insurance in disregard of state or federal regulations."

That, gentlemen of the Insurance Section of the American Bar Association, was the recommendation of your predecessors. You will find it set forth in Volume XXVIII of the Reports of the American Bar Association and I quoted from page 516. You will find there a very able, intelligent, and logical legal discussion intending to prove that the insurance business has become a national business and that since it is a national business, it ought to be subjected to national regulation rather than to local regulation.

If this recommendation had proceeded from any member of the Securities and Exchange Commission or of the Temporary National Economic Committee instead of from the American Bar Association, I shudder to think of the charges that would be leveled at our heads.

But your predecessors were not alone in this position. The truth is that every specific suggestion for the expansion of federal power over the insurance business with which I am familiar has proceeded either from members of the Bar Association, individually or collectively, or from the insurance companies themselves. In the Insurance Blue Book published in 1877 from the offices of The Insurance Monitor and The Insurance Law Journal at 176 Broadway, New York City, I find on page 32 the following interesting bit of history:

"The natural result of Federal success (in the Civil War) was the centralization of governmental authority. . . . Not alone was the concentration of power at Washington shown in political acts, in the control of the conquered territory, and the management of the national finances, but in the jurisdiction assumed by the Federal courts, and the whole spirit of their decisions. . . . It is no wonder that, under such circumstances, the attention of the agency companies was turned to Washington for protection against the aggressive acts of hostile legislatures. Relief from this source was strongly agitated during 1865 and 1866. In November, 1865, the companies"—listen to this historical report from the Insurance Blue Book!—"appointed a committee to draft a suitable national law and secure its passage by Congress. . . . An act was prepared, accordingly, providing for the appointment of an Insurance Commissioner by the President and the establishment" (mirabile dictu!) "of a Bureau at Washington, where all deposits, fees, and other expenses of agency companies were to be exclusively paid, and their returns made for all other than local business."

The proposed bill was not enacted, but the effort of insurance companies to secure federal regulation of insurance did not end. In 1892 there was introduced into Congress another bill to provide for federal supervision. The bill was drafted at the direction of John M. Pattison, President of the Union Central Life Insurance Company. Again in 1897 United States Senator Orville H. Platte of Connecticut, a state which was the domicile then as now of some of the most important insurance companies in the country, introduced in the Senate a federal control bill substantially in conformity with the proposal of President Pattison of the Union Central and, curiously enough, the Supreme Court cases which are now cited by representatives of the insurance industry to deny the federal power over insurance were brought at the instance of insurance companies for the express purpose of escaping state regulation and substituting federal rule of insurance in its place.

In order that there may be no misunderstanding of my own position, I want to say at this juncture that I would not give my support to any legislative proposal which would have the effect of weakening the power of the states in the field of insurance law or insurance supervision, and when I cite these instances of the activity of insurance companies to broaden the federal power over insurance, I do it for the purpose of making clear the unfortunate confusion of thought and purpose which beclouds our present-day approach to the modern economic problem.

From the very beginning of our history Americans have always sought to reduce government interference with the activity of the citizen to a minimum. It is a normal and proper attitude of mind, and one with which I completely agree, for the supremacy of the natural person is fundamental to our American way of life. As individuals we do not like to have the Government regulating or controlling what we do and as organizations of individuals we feel exactly the same way. But as organizations grow in power and in wealth, the problem of Government in its relation to them becomes increasingly more difficult, for organizations always tend to subordinate the individual to the organization. The history of our Government establishes a clear parallel between the growth of the business organization and the growth of the federal establishment in Washington. Precisely in the same degree that business organizations become national rather than local in their scope, the federal law regulating business has been enlarged, and this did not begin in 1933. It has proceeded at all periods, under all administrations, under all political parties, and without regard to any partisan argumentation or any personal or partisan political aspiration.

Paul v. Virginia

I doubt if a more illuminating decision upon the problems of government and business was ever written than that of Justice Field in the case of *Paul v. Virginia* (8 Wall. 168), the first of the Supreme Court tests initiated by the insurance companies for the purpose of escaping state regulation and establishing the principle that Congress has the power, under the commerce clause, to regulate insurance. It is not necessary for me to tell this audience that the State of Virginia had passed a law requiring insurance companies incorporated in other states to make deposit with the Treasurer of Virginia of certain bonds before a license to do business would be issued; that Paul, an agent for certain New York companies, made application for his license, refused to deposit the bonds and proceeded to engage in the business of selling insurance so as to provoke his own arrest and thus throw the question into the courts. The brief filed on behalf of the insurance companies in their attack upon state regulation was based upon three contentions:

First, that a corporation created by the law of a state is a citizen within the meaning of the Constitution,

Second, that the constitutional power of Congress "to regulate commerce" does not exclude commerce carried on by corporations.

Third, that the business of insurance is commerce and that it is not within the power of a state to pass any law regulating insurance carried on among the states.

I need not here mention that Justice Field in this case ruled that a contract of insurance is a personal contract and does not constitute that intercourse among the states which constitutes the commerce over which Congress has jurisdiction.

It is interesting to note, however, not only that this interpretation was rejected by counsel for the insurance companies, but that the Committee on Insurance of the American Bar Association in 1905 also argued that the business of insurance actually is interstate commerce, the decision of the Supreme Court of the United States to the contrary notwithstanding. The following quotation from the 1905 report of the American Bar Association Committee on Insurance indicated this point of view:

"In view of the fact that in England insurance is regulated by the Board of Trade; in France, by the Minister of Commerce; in Norway, by the Commercial Registrar; in Austria, by the Tribunal of Commerce; and in the German Empire by the central government, it is fair to affirm that insurance is commerce and has from the beginning been treated as such except in the cases in which the question has been incidentally discussed by the Supreme Court of the United States. It is, however, significant that the majority opinion in the Lottery Cases makes no reference whatever to the line of cases known as the Insurance Cases; and the reasonable deduction from this is that their authority has been weakened."

As lawyers, we all know how to make an argument to prove the point that we have in mind, nothwithstanding the facts that are before us.

Returning, however, to the case of *Paul v. Virginia*, we find the insurance companies arguing that in the interests of efficiency the federal power should be supreme—

"It cannot be supposed," says the brief, "that the Constitution—one of whose objects was to secure a more perfect Union—was intended to be less efficient in these respects than the Articles of Confederation had been. The defect in the article of the Confederation was not that it imposed too great restrictions upon the powers of the States, but that it was wholly without the protection and support of a supreme federal power."

Thus spoke the attorneys of the insurance companies in the greatest forum in the world, the greatest legal forum, the Supreme Court of the United States.

This again was the tenor of the contention of the New York Life Insurance Company in the case which it brought to a decision in the October term of the Supreme Court in 1913 against Deer Lodge County, Montana (231 U. S. 495). In that case counsel for the insurance company, which included a representative of the "brains trust," Dean Roscoe Pound of the Harvard Law School, went to great length to prove that a tax levied by the Montana county on certain assets of the company was "illegal, unlawful and void for that said defendant was without jurisdiction to levy or collect said tax and the levy and collection thereof was and is a burden upon interstate commerce contrary to Section 8, Article I of the Constitution of the United States." Seemingly nothing was left unsaid to support the contention that the business of insurance, as carried on by the New York Life Insurance Company in Montana, was interstate commerce. Special emphasis was laid upon the allegation that all decisions were rendered in New York, that the authority of the Montana representative was strictly limited, that applications were received solely for the purpose of transmission to the home office and that the use of the United States mails was essential to practically every step in the transaction of the insurance business.

Now, it is obvious that the little tax, a few hundred dollars, that was levied by the Montana county was not the objective that the New York Life Insurance Company was after. It was not seeking to avoid the payment of that small tax. It was seeking to escape state regulation and to establish the principle that the business of insurance is interstate commerce and should be subjected to federal control.

In another case, *New York Life Insurance Company v. Cravens* (178 U. S. 389) the company pointed out that it is a mutual company and as such "was the administrator of a fund collected from its policyholders in different states and countries for their benefit" and it was pointed out not only that the modern business of life insurance had taken on a national and even an international character, but that when *Paul v. Virginia* was decided insurance was "to a great extent local." The brief continued the argument saying, "The great and commanding organizations of the present day had hardly begun the amazing development which has made them the greatest associations of administrative trusts in the business world." And for these reasons the insurance companies over a period extending from 1868 to 1913 have argued in the federal courts for federal supervision of insurance while they have promoted until as late as the early years of the present century the introduction in both houses of Congress of bills expanding the federal power over the insurance business.

My purpose today, however, is not to play upon the change of attitude by insurance companies but to survey these cases and these arguments in an effort to discern the nature of the economic problem with which we are contending. It is because, in my opinion, the case of *Paul v. Virginia* is explicit upon this point that I regard it to be of primary importance, not so much upon the question of whether insurance is or is not commerce within the meaning of the Federal Constitution, but because this case clearly defines the difference between a citizen and a corporation. It was the contention of the insurance companies at a time when state regulation was felt by them to be too onerous that corporations were citizens under the Constitution and thus entitled "to all Privileges and Immunities of Citizens in the several States." In rejecting this argument, Justice Field reasserted the principle the violation of which throughout the world has been the chief cause of the distress and disorder that afflicts our era, namely that the citizen for whom the Declaration of Independence was written and for whom the Constitution was drafted is the natural citizen.

Corporations Defined

Every lawyer in America, well-grounded in the history of his Government and in the development of our institutions, must know this to be the fact. I have been proud to find it written into the Declaration of Rights and the Constitution of the State of Wyoming, which declared in Article I, Section 33, that:

"Corporations being creatures of the state endowed for the public good with a portion of its sovereign powers must be subject to its control."

That, gentlemen, is the historic and fundamental principle of Anglo-Saxon law. Our heritage down through the centuries, the heritage for which Great Britain is today fighting the fight of its life, is the principle that declares the human being superior to all forms of organization, whether those forms are created for the purpose of carrying on business or for the purpose of carrying on government.

We have lost sight of this distinction and have persisted in treating the corporation as though it were a natural person and extending to it the very privileges and immunities of citizenship which under the decision of the Supreme Court it does not possess. The result has been that with the constantly growing power of economic organizations which have spread their realms across state lines, across oceans and continents, the natural person in the economic field has found himself outmatched and overpowered.

I think the language of Justice Field in *Paul v. Virginia* should be read over and over again by every legislator in America. Let me read it to you who have gathered here:

> "Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.
>
> "If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States."

Thus spake the Supreme Court of the United States! The decision was prophetic. The condition Justice Field feared is now a reality. The principal business of every state in the Federal Union is today controlled by corporations created by other states, not by reason of any change of principle or of law but because under the law business has taken on an increasingly national scope. The new aspect of modern corporate business is national. Nay, more than that, a large portion of the business of the world is now controlled by such corporations and, in my opinion, it was precisely because the statesmen and lawyers of Europe had completely lost touch with their inherited social wisdom that the present world crisis is upon us. Political freedom is being undermined because economic freedom has been endangered if not lost. The economic state, outgrowing the geographical boundaries of the political state, has had effects upon the economic life of the people which the political states have not been able successfully to regulate in the public interest because economic organization and political organization are wholly out of adjustment. The consequence has been the growth of the totalitarian or socialist states and the attack upon both capitalism and democracy which now threatens civilization itself.

Do you remember the rise of Hitler? Do you remember that when Germany was swept with danger of the Communist Revolution in Russia, the owners of property, the great corporate owners of property, seeking to protect themselves, as they thought, against the seizure of property by the Dictator Stalin, financed Adolf Hitler in his National Socialist attack upon the German Republic? And Herr Thyssen, the great industrial and economic leader of Germany, the arch-exponent of what was called private property, was the man who contributed the money which led to the rise of Hitler. Page Mr. Thyssen today! Banished from Germany, fleeing indeed, because he knew if he stayed his destiny would be in a concentration camp. The totalitarian socialist state of Germany, financed by the big business of Germany, crushed the liberties of the people and the liberties of the businessmen who called it into existence.

The rapid expansion of economic organization has been a world development to be noted here in America as well as in Europe. There is nothing hostile to the insurance industry or to those who are engaged in it in the fact that the studies of the Temporary National Economic Committee have demonstrated beyond cavil that a high degree of concentration of economic power and wealth exist in this industry. When this study began, Justice Douglas of the Supreme Court, then Chairman of the SEC, asserted that no policyholder need be concerned that the facts to be brought out in the testimony would in any way jeopardize the protection which he counts upon and when the hearing was drawing to its conclusion, I made an opportunity to say that "I am personally satisfied that there is not a single responsible official of any of these companies who is not as sincerely interested in restoring and promoting economic prosperity in the United States as is any public official."

I repeat that statement today, and I am glad to be able to say to this group that nothing which was developed in this study reflects in the slightest degree upon the integrity and ability and the patriotism of the men who direct the major insurance companies of the United States.

State Laws Govern

With respect to certain testimony that was produced to show that in the huge mutual companies policyholders exercise no function, no real function, in the selection of their officers, I was careful to say, "So far

as any testimony produced before the Committee is concerned, all of these companies are operated in full compliance with the laws of the state by which chartered and in which they operate."

Ours was not another Armstrong Committee such as was led by Chief Justice Hughes a generation ago to ferret out wrongdoing by insurance executives or to pillory the insurance industry, individually or collectively. Of course, in the case of the Armstrong Committee, definite, specific charges had been made, a condition had become public which it was necessary for the State of New York to investigate, but there never has been a time when anything that this Committee has done took on any of the characteristics of that investigation, either in its initiation or in the manner in which it was carried on. Our study was solely a study to determine the facts with respect to the effect upon our economic system of the concentration of assets which now are controlled in the insurance business.

It is known, for example, to every inhabitant of this country who is alive to conditions that the problem of small business is one of the most serious with which we have to deal. Of almost two and one-half million business units in the United States, more than 90 per cent have assets amounting to less than $250,000 each. In other words, the bulk of the business of America is small business, and I have no hesitation in saying to you here that big business cannot safely watch the deterioration of small business because big business cannot exist without the tributary small business that feeds its prosperity.

These small business units have difficulty in obtaining both credit and venture capital, and the insurance companies to whom, through the payment of premiums, the savings of the people flow, can be of little help to them. The directors of insurance companies are trustees and when they invest their company assets they must place those assets in investments which they regard to be sound and in which the investment of insurance funds is permitted by law. They are not interested in providing venture capital and their size is so great that they are not interested in providing small loans which business requires. It is the securities of large industrial and commercial organizations or the securities of government that the administrators of insurance company assets find the outlet for their funds and our study showed that as of December 31, 1938, the forty-nine largest legal reserve life insurance companies owned:

11 per cent of the direct and guaranteed debt of the United States government;
9.9 per cent of all state, city and municipal and political subdivisional debt;

(I pause to mention here that if anybody in the Federal Government had any thought of seizing the assets of the large companies, they would be seizing their own bonds, the bonds of the Federal Government, by which the Government continues to operate.)

These companies own:

22.9 per cent of all railroad bonds;
22 per cent of the entire public utility debt;
15 per cent of the industrial debt;
11 per cent of all farm mortgages;
14 per cent of all city mortgages.

The savings of the little fellow, the flesh-and-blood citizen who makes up the nation, flow through the payment of premiums into these large reservoirs of capital, and they constitute the resources upon which Government and business alike depend for their financial assistance.

A striking thing, nothing wrong about it, that was developed at the hearing in one instance, was that these small premiums contributed by persons who have bought small policies upon their own lives, sometimes as small as $1,000, were paid into the company which financed the building of Rockefeller Center. In other words, the wealthiest family in America, if not the world, found recourse to the savings of the small citizen for the construction in the City of New York, in one of the greatest enterprises of real estate development that the world has ever seen. Again I say there is nothing to criticize in the transaction. It merely illustrates the very point of the whole study, that the savings of the people turned into this channel fall into this reservoir and then in turn become the resource from which investment in business is to be made.

In many instances city mortgages were taken out by large organizations, but for the most part the only recourse that individuals have had to the assets of the large companies is for rural mortgages and for policy loans.

The assets of insurance companies increased in the period between 1910 and 1938, less than 30 years, from $3,867,000,000 to $27,755,000,000, or almost sevenfold, and the annual income of these companies today exceeds $5,000,000,000, thus approximating the annual receipts of the Government of the United States itself, or, to put it in another way, the annual income of the life insurance companies today is greater than the total assets of the corporations less than 30 years ago.

The striking fact is that the five largest life insurance companies own more than half of all insurance company assets. Of equal importance is the fact that 16 companies which are domiciled in New York and in New England hold 74.1 per cent of all insurance company assets. It is true that these assets are invested all over the country and premiums which are paid in by policyholders in every state find their way back, in one way or another, into the individual states. Approximately 21 states receive in investments more than they contribute by way of premiums, but these investments, for the most part, are Government bonds, railroad bonds, utilities, and other industrial bonds and stocks of what we call big business, mortgages, real estate and policy loans.

Thus do we find in the economic story of the insurance companies the reflection of our economic condition. This study is not an argument for any particular form of legislation, it is not an argument for federal regulation, it is not an argument for taking over the insurance company assets, it is not an argument for Government competition with industry, because Government entry into such business would only be worse, no solution there. It is merely a part of the diagnosis of economic conditions or, in other words, the revelation of economic facts without which no sound judgment can be pronounced upon the question of state control or federal control of insurance or of any other industry. The significance goes much deeper. Indeed, it plumbs the very depths of our modern dilemma, for it has shown in a striking way the relation between the citizen as a natural person and the organizations which are created to serve the citizen and which ought to promote his individual and social welfare.

Individual Prosperity First

If there is one thing clear to me as a result of this study, it is a very simple fact which I am sure no one will deny, but which we seldom take time to consider,

namely, that the prosperity of any corporation or of any Government depends first, last and all the time upon the prosperity of the individual. The success of the insurance industry has been a result of the fact that the commodity which it has to sell is security and safety for the natural person. If the natural person is not safe and secure, if he is without property, if he is without employment, if he does not know where his next meal is coming from, he is a source of danger to both business and Government and the salvation of democratic organization depends entirely upon the degree to which economic and political organizations make it possible for natural persons to have jobs, to own property, to pursue their happiness in peace and security.

There never has been a time in the history of our Government that this has not been the fundamental concept of our people, nor has there ever been a time since the Constitution was drafted that, as a nation, we have failed to place the interests of people first. In both sectors of our dual government, through the state legislatures and through the Federal Congress, we have pursued an undeviating course of legislation upon the principle that human rights come before property rights. We have tried to keep authority local because we all believe in the freedom of the individual, but when local authority has proved to be inadequate for the protection of human rights, we have not hesitated to turn to federal authority for relief.

The Congress of the United States has been reluctant to use the commerce power to impose rigid regulation upon the business activity of the citizen, either as an individual or in groups, and regulatory laws have been enacted only when abuses became so great that they could no longer go without a remedy. In the courts, as well as in the legislatures, we have preferred to keep our governmental functions as close to the people as possible.

This explains decisions like *Paul v. Virginia* and *New York Life Insurance Company v. Deer Lodge*. In each instance a statute was being construed and the court was not oblivious of the fact that to invalidate the statute would mean to destroy a regulation in the public interest which the states had deemed it wise to impose in a field in which the Federal Government had not acted. The fact that the Federal Government does not exercise a power granted to it by the Constitution does not, of course, deprive the Federal Government of that power and the history of our business legislation demonstrates conclusively that as business becomes more and more concentrated, as it becomes more and more national and international in its scope, the inevitable result has been the expansion of the federal power.

We have seen the steady extension of this power since the Civil War keeping pace with the national growth of commerce and industry. We saw the National Bank Act in 1864 followed in due course by the Interstate Commerce Act, and every single argument that has been made in our day against every new bill, whether passed by Republican or Democratic administration, for the regulation of national industry, was made against the bill sponsored by the Abraham Lincoln administration for the national control of the establishment of national banks. The argument was then made that to pass a National Banking Act meant the destruction of the personal liberty of the individual and of the sovereignty of the states. We saw the Interstate Commerce Act in its turn followed by the Federal Trade Commission Act, by the Packers and Stockyards Act, which was signed, as I recall, by President Harding, by the Securities and Exchange Commission Act, the Radio Commission Act, and the like, each a direct result of a growing need for the protection of the individual in an increasingly complex economic world. Even today in the field of insurance there is, for example, no effective state power to regulate the sale of insurance by radio or the sale of insurance by mail. In these, as in many other instances, the expansion of business has followed in the wake of scientific progress. This illustrates how the adjustment of state power and federal power is constantly changing its forms and why it is difficult, if not impossible, to draw the line of demarcation anywhere in the field of commerce between state power and federal power, and nowhere today do we find any political party which proposes to undo these acts. And let me interpolate here, lest there be any danger of misunderstanding, if there is any national business in the whole scope of our industrial and commercial system for which state regulation should be preserved, it seems to me it is the business of insurance because insurance deals with individuals, the contract is between the natural person and the organization, and the natural person ought to have the opportunity to take his recourse to the nearest governmental agency, the nearest sovereign agency, and that is the state. Therefore I say again that personally I would not support any law that would undertake to do away with state regulation of insurance, and there never has been suggested to me or to any member of the TNEC or to the committee as a whole any thought of doing away with state regulation or imposing federal supervision.

T. N. E. C. Purpose

The distinction, however, between state and federal power is not of any great importance so long as the Government, both state and nation, belongs to the people. The important distinction is the line which divides the rights of the individual from the collective power of groups of individuals, whether that collective power is exercised by business or by Government organizations. When it is exercised oppressively or undemocratically by business organizations it takes on the vices of monopoly. When it is exercised arbitrarily by Government, it assumes the vices of tyranny. The mistake which is being made in the totalitarian states of Europe is the belief that only arbitrary government can furnish an antidote for the failure of large business organizations to provide social justice. Arbitrary government is not the remedy for arbitrary economic power. It is not necessary to substitute collectivism in government, run by political dictators, for collectivism in business, run by economic despots. It is only necessary to learn how to adjust the huge economic power represented in the modern corporation to the social needs of the natural person. The whole purpose and function of the Temporary National Economic Committee has been to marshal the significant facts of our modern organized economy in order that the patriotic good sense of our leaders in business and in Government may assert itself in such a way as to preserve democracy and the right of private property, to keep people free and to keep business free and to guarantee to the natural persons who compose the population of America the prosperity and happiness for the achievement of which we certainly have the resources if only we have the intelligence and the tolerance to use them for the benefit of all. Thus can we continue to make Government in America an instrument of liberty for all.

A FABLE IN SLANG*

"The Attenuated Attorney Who Rang in the Associate Counsel"

By George Ade

Illustrated by John T. McCutcheon

ONCE there was a sawed-off Attorney who had studied until he was Bleary around the Eyes and as lean as a Razor-Back. He knew the Law from Soup to Nuts, but much learning had put him a little bit to the Willies. And his Size was against him. He lacked Bellows.

He was an inconspicuous little Runt. When he stood up to Plead he came a trifle higher than the Chair. Of the 90 pounds he carried, about 45 were Gray Matter. He had Mental Merchandise to burn but no way of delivering it.

When there was a Rally or some other Gabfest on the Bills, the Committee never asked him to make an Address. The Committee wanted a Wind-Jammer who could move the Leaves on a Tree 200 Feet distant. The dried-up Lawyer could write Great Stuff that would charm a Bird out of a Tree, but he did not have the Tubes to enable him to Spout. When he got up to Talk, it was all he could do to hear himself. The Juries used to go to sleep on him. He needed a Megaphone. And he had about as much Personal Magnetism as an Undertaker's Assistant.

The Runt lost many a Case because he could not Bark at the Jury and pound Holes in a Table. His Briefs had been greatly admired by the Supreme Court. Also it was known that he could draw up a copper-riveted Contract that would hold Water, but as a Pleader he was a Pickerel.

At one time he had an Important Suit on Hand, and he was Worried, for he was opposed by a couple of living Gas Engines who could rare up and down in front of a yap Jury for further Orders.

"I have the Law on my Side," said the Runt. "Now if I were only Six-Feet-Two with a sole-leather Thorax, I could swing the Verdict."

While he was repining, in came a Friend of his Youth, named Jim.

This Jim was a Book-Agent. He was as big as the Side of a House. He had a Voice that sounded as if it came up an Elevator Shaft. When he folded his Arms and looked Solemn, he was a colossal Picture of Power in Repose. He wore a Plug Hat and a large Black Coat. Nature intended him for the U. S. Senate, but used up all the Material early in the job and failed to stock the Brain Cavity.

Jim had always been at the Foot of the Class in School. At the age of 40 he spelled Sure with an Sh and sank in a Heap when he tried to add 8 and 7. But he was a tall Success as a Book Pedler, because he learned his Piece and the 218 pounds of Dignified Superiority did the Rest.

Wherever he went, he commanded Respect. He could go into a strange Hotel and sit down at the Breakfast Table and say: "Please pass the syrup" in a Tone that had all the majestic Significance of an Official Utterance. He would sit there in silent Meditation. Those who sized up that elephantine Form and noted the Gravity of his Countenance and the fluted Wrinkles on his high Brow, imagined that he was pondering on the Immortality of the Soul. As a matter of fact, Jim was wondering whether he would take Ham or Bacon with his Eggs.

Jim had the Bulk and the awe-inspiring Front. As long as he held to a Napoleonic Silence he could carry out the Bluff. Little Boys tip-toed when they came near him, and Maiden Ladies sighed for an introduction. Nothing but a Post-Mortem Examination would have shown Jim up in his True Light. The midget Lawyer looked up in Envy at his mastodonic Acquaintance and sighed.

"If I could combine my Intellect with your Horse-Power, I would be the largest Dandelion in the Legal Pasture," he said.

Then a Happy Idea struck him amidships.

"Jim, I want you to be my Associate Counsel," he said. "I understand, of course, that you do not know the difference between a Caveat and a Caviar Sandwich, but as long as you keep your Hair combed the way it is now and wear that Thoughtful Expression, you're just as good as the whole Choate Family. I will

"Your honor," said Jim, "we are ready for trial."

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introduce you as an Eminent Attorney from the East. I will guard the Law Points and you will sit there and Dismay the Opposition by looking Wise."

So when the Case came up for Trial, the Runt led the august Jim into the Court Room and introduced him as Associate Counsel. A Murmur of Admiration ran throughout the Assemblage when Jim showed his Commanding Figure, a Law Book under his Arm and a look of Heavy Responsibility on his Face. Old Atlas, who carries the Globe on his Shoulders, did not seem to be in it with this grand and gloomy Stranger.

For two hours Jim had been rehearsing his Speech. He arose.

"Your Honor," he began.

At the Sound of that Voice, a scared Silence fell upon the Court Room. It was like the Lower Octave of a Pipe Organ.

"Your Honor," said Jim, "we are ready for Trial."

The musical Rumble filled the Spacious Room and went echoing into the Corridors. The Sound beat out through the Open Windows and checked Traffic in the Street. It sang through the Telegraph Wires and lifted every drooping Flag.

The Jurors turned Pale and began to quiver. Opposing Counsel were as white as a Sheet. Their mute and frightened Faces seemed to ask, "What are we up against?"

Jim sat down and the Trial got under way. Whenever Jim got his Cue he arose and said, "Your Honor and Gentlemen of the Jury, I quite agree with my learned Colleague."

Then he would relapse and throw on a Socrates Frown and the Other Side would go all to Pieces. Every time Jim cleared his Throat, you could hear a Pin drop. There was no getting away from the dominating influence of the Master Mind.

The Jury was out only 10 minutes. When the Verdict was rendered, the Runt, who had provided everything except the Air Pressure, was nearly trampled under foot in the general Rush to Congratulate the distinguished Attorney from the East. The Little Man gathered up his Books and did the customary Slink, while the False Alarm stood in awful Silence and permitted the Judge and others to shake him by the Hand.

Moral: An Associate Counsel should weigh at least 200 Pounds.

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BOOK REVIEWS

A Judge Comes of Age, by John C. Knox, published by Charles Scribners' Sons, New York.

Judge Knox will soon have completed three times the twenty-one years which marks the attainment of manhood, but the title of his book connotes the fact that his life as a judge has only recently passed 21 years.

But one reaches maturity as a judge more quickly than a child, for all the years of his boyhood and early youth, and the years of his professional study and experience and the years of his responsibility in public office (here the Federal District Attorneyship) ripen and season his powers and it is not more than a passing period of what he himself calls "buck fever" before he conquers his apprehension of inadequacy and becomes a full grown judge equal to the emergencies which confront him. Soon the difficult tasks become easy and experience enables him to take all obstacles in his stride. A reviewer must say something about Judge Knox because in his book he says so little of himself.

All this preparation for the judicial office Judge Knox had. His father was a lawyer and as a boy he began to think of that as his chief desire. His practice at the bar of his native town led him by easy stages through the preliminary difficulties. Practice in New York broadened his experience. Service in the office of the United States District Attorney made him familiar with the litigation which later was to come before him as a Federal Judge.

Now for the book itself. To the young lawyers it should be a treasure house. To read it is the best substitute for experience. It was handed to one of our juniors who was busy with his first copyright case because it was believed it would help him to see how a judge's mind works in those unusual cases. And so also it is to be regarded as to the many and varied cases of extraordinary importance and dramatic interest. No young lawyer should neglect the opportunities which this book affords to learn what is going on in the courts and how best to conduct that sort of work. It covers a really amazing field.

Best of all the book is so forthright, so revealing and so modest and seemly that youth might find it a prophylaxis against one of the lesser faults to which youth sometimes falls victim.

The older men of the law whether on the bench or at the bar may reap as much benefit from this book as the younger men for its scope is wider than the experience of most men.

Before I read this book I placed first among judicial autobiographies "Letters to Elizabeth," written by Lord Shaw of Dunfermline, but now I place these two books side by side at the head of their class.

EDGAR B. TOLMAN.

Chicago.

You Be the Judge, by Ernest Mortenson, with illustrations by Alain. 1940. London, New York and Toronto: Longmans, Green. Pp. x, 451.—The title of this book gives little clue to its object and little hint of its merit. Its object is to give the layman a general idea of the principles of the law. Its merit is that it succeeds. Not since Blackstone undertook to give the young gentlemen of Oxford a knowledge of the laws of England has there been so effective an attempt to interest the layman in the law of the land. Not that this is a second Blackstone—doubtless the author himself would be the first to disclaim any such pretension; but what Mr. Mortenson has set out to do he has done well.

A lawyer is disposed to greet with a smile of mere derision attempts to give the layman a smattering of law, but this volume is not to be dismissed in that fashion. To be sure, Mr. Mortenson has sugarcoated his presentation; but underneath the coating the doctrine is sound.

The book begins with the principles of tort, and shows how the courts apply them, especially to liability

for accident, thus enlisting the interest of the reader by a topic with which he cannot but feel some immediate concern. From this it proceeds to most of the other leading topics of the law, Property, Crime, Domestic Relations, Equity, Contracts, Bills and Notes, Insurance, Wills, Evidence. There is even a glimpse into Constitutional Law and International Law.

Mr. Mortenson does a remarkable job in keeping his pages alive and entertaining. He shows by illustration how the principles work. He calls to his aid the popularity of quiz games, and closes each chapter with a lively quiz. Here the reader applies what he has learned to the decision of real controversies. He becomes the judge—hence the title of the book.

An appendix gives suggestions for further reading. This is a well-selected list of books for readers whose interest has been aroused to the point of real study of the law.

Drawings and sketches adorn the text, a few serious, most merely comical. Who shall say that books about the law must be dull? The publishers have made an attractive volume. It would be a grand Christmas present for a law student, or indeed for anyone mentally alive.

ARTHUR M. BROWN.

Boston, Massachusetts.

The Judicial Power of the United States, by Robert Jennings Harris. 1940. Louisiana University Press. Pp. 238. This is a challenging examination of Federal judicial power. Its thesis is that all Federal judicial power, except that conferred by the Constitution upon the Supreme Court in the grant of original jurisdiction, is at the absolute disposal of Congress. Within this field Congress possesses plenary power to create or abolish inferior courts, to confer jurisdiction to the Constitutional limit or to narrow it to the vanishing point. Likewise it may without restraint regulate practice procedure and define with particularity relief grantable.

In failing, as the author insists, to recognize this truth, the judges have been motivated by their desire to maintain a judicial oligarchy. The true faith he finds in Marshall. The beginning of the heresy that courts possess some inherent powers he attributes to "the apostolic Taney."

With the attitude of the courts as to moot cases, Professor Harris seems to be satisfied. "Courts do not sit as pathologists to conduct autopsies on dead issues." (p. 42.) With their refusal to perform non-judicial functions and to render advisory opinions he has less patience. He confines his specifications, however, to the charge of inconsistency. He agrees with Professor Albertsworth that the Supreme Court has exercised advisory functions in giving counsel and advice to Congress and its committees on legislation pertaining to the judiciary, in the advisory nature of judicial dissents, in obiter dicta advisory to congressional or state action, and in judicial construction to compel congressional or state action. "One of the most amazing advisory opinions of the members of the Court is the gratuitous opinion of Chief Justice Hughes in a letter to Senator Wheeler concerning Professor Corwin's proposal that the court sit in divisions." (p. 47 note.) Though it is not mentioned, no doubt the conference of Senior Circuit Judges would fall within the same condemnation.

In dealing with the external limits of judicial power the severest strictures are reserved for the Court's construction of the constitutional provision that jurisdiction exists only over "cases and controversies."

To permit the validity of legislation to be determined in injunction suits brought by stockholders against corporations "requires the imagination to picture tax-loving corporations rushing avidly to pay high corporate taxes to the government against the interests and wishes of its shareholders." (p. 19.)

On the other hand the Court is charged with having emasculated the Federal Declaratory Judgment Act by the strictness of its requirement as to the existence of an actual controversy. "The federal declaratory judgment has, therefore, been completely futile as a means of preventing litigation in cases involving the validity of acts of Congress, and from the foregoing it is logical to assume that none will be issued except where an injunction would issue." (p. 67.)

Although he does not directly so state, according to Professor Harris the inefficiency of the Declaratory Judgment Act has been supplied by the court's liberalized conception of property rights and the development of the injunctive process. "The total effect of the *International News Service Case*[1] and *Pennsylvania and Ohio v. West Virginia*[2] was to vest in the Federal judiciary a boundless discretion to create new rights and enforce them by injunction without the self-imposed limitation of an actual case or controversy." (p. 41.)

It is this use of the injunction in the exercise of its equity jurisdiction that arouses Professor Harris' greatest ire. Anathema to him are the arguments of those who insist "that the federal courts possess inherent equity jurisdiction and powers beyond the reach of legislative enactment." (p. 112.) This he finds to be a strange metamorphosis of Justice Story's theory that the Constitution places a moral obligation on Congress to create inferior federal courts and bestow upon them all of the federal judicial power not directly granted to the Supreme Court. His own view is that Congress can grant jurisdiction and at the same time circumscribe its exercise by denying the right to pass upon certain questions, such as the constitutionality of statutes, or prohibiting it from the granting of certain relief, such as the writ of injunction, or in any other way.

The strongest illustration of inherent power he finds in the holdings of the Supreme Court that the admiralty jurisdiction of the federal courts can not be impinged upon by legislation. Another instance emphasized is *Crowell v. Benson*[3] in which it was held that a private litigant can not be precluded by the adverse finding of jurisdictional facts by an administrative tribunal from asserting in a court a claimed constitutional right and there having reviewed the facts upon which the claim was based. As indicative of the same attitude are listed the strict construction of the Johnson Act withholding from the federal courts the power to issue injunctions against state rate-making bodies "where a plain speedy and efficient remedy at law or in equity may be had in the courts of such state" and the granting under special circumstances of injunctions against the collection of taxes notwithstanding the statutory prohibition.

Despite this, justification is found in the decisions

1. International News Service v. The Associated Press, 248 U. S. 215.
2. 262 U. S. 553.
3. 285 U. S. 22.

for the author's view that "the use of the ancillary writ of injunction may, therefore, be regulated by Congress even in cases where equity jurisdiction exists." (p. 128.) Indeed, it is asserted that "the Court has never held invalid any of the numerous restrictions imposed by Congress upon the exercise of equity powers." (p. 124.) Specifically the Court is credited with having respected the spirit of the Norris-LaGuardia Act abolishing injunctions in labor disputes except under carefully specified conditions. Even here, however, a caveat is added: "Perhaps these decisions are but a reflection of an ephemeral attitude of a court chastened by a combination of election returns and a proposal to infuse it with a sufficient number of new members, a proposal that shocked the Court into what may be accurately called the Supreme Court revolution of 1938. If so, such attitude is probably destined to pass as soon as the lessons of chastisement are forgotten." (pp. 143, 144.)

Naturally one who holds these views would deny to the courts the inherent power to vindicate their authority by punishment for contempt. Professor Harris' view is that "the summary power of the courts to punish contempts, therefore, is not a power derived from immemorial usage but a power seized upon and developed by the courts themselves." (p. 162.) In his view the Supreme Court has abandoned the spirit of the Act of 1831[4] which limited the power of the federal courts to punish for contempt by summary process to misbehavior of persons in the presence of the court, "or so near thereto as to obstruct the administration of justice." This abandonment he finds in the emphasis placed upon the inherent power to punish in such cases with consequent emancipation from the authority of Congress to regulate by requiring a trial by another tribunal or by jury. The power thus freed from Congressional regulation he insists has been extended beyond all reasonable limits. Nor is he reconciled by judicial recognition of Congressional power to provide for trial by jury of criminal contempts which are also crimes.

More objective is the discussion of the power of Congress to punish for contempt and of the question whether this power can be conferred upon administrative tribunals. However, as to the latter he expresses the view that "the antipathy of the Courts to administrative tribunals as expressed in the furiously oracular intonements of Chief Justice Hughes indicates that such a step will not be taken soon." (p. 180.)

The least controversial and one of the most valuable chapters is an exposition of the functions of legislative courts. Especially keen is the analysis of the dual role played by the courts of the District of Columbia as both legislative and constitutional tribunals.

In its qualities and defects this polemic is illustrative of a type of writing being currently done by certain highly articulate law school men. It should interest, but neither its conclusion nor its tone will commend it to representative lawyers. It is unfortunate that these members of the bar, whom Professor Harris summarily dismisses as "Olympians" and "worthies" who in 1937 protested against "the proposal for judicial reform," do not more frequently express their reasoned views upon subjects such as that treated in this volume.

WALTER P. ARMSTRONG.
Memphis, Tennessee.

4. Stat. at Large 487; Judicial Code, Sec. 268.

Model Ocean Bill of Lading, by Eberhard P. Deutsch. 1940. Mobile: Privately printed. Pp. viii, 284. In the course of his professional work the author of this book had occasion to prepare for a steamship company in Alabama a form for a bill of lading, one which should cover the carriage of goods by sea in both foreign and coastwise commerce and afford a full measure of protection to both shipper and carrier. He now gives to the maritime world a model form, in the hope that it may serve as the basis for a uniform contract of universal adoption, a uniformity much to be desired. The book is in design a commentary upon this form, but it is much more than a mere discussion of the terms of a bill of lading.

Mr. Deutsch makes no claim to an exhaustive treatise upon the law of carriage of goods by sea, but within the limits of its brevity his treatment of the subject is by no means inadequate. He discusses with simplicity and directness the nature of the contract between the shipper and the carrier, writing for the layman quite as much as for the lawyer. Indeed he may be said to have had the layman predominantly in mind, the underwriter, the claim-agent, the shipper—the shipper particularly.

Prior to the Harter Act water carriers could stipulate in the bill of lading against liability for their own negligence, even negligence in making their vessels seaworthy. The Harter Act of 1893 restricted this freedom, which had been greatly abused. It took from the carrier the right to stipulate against liability for failure to use due diligence to make its vessels seaworthy, or against failure properly to load, stow, carry, and deliver the cargo. On the other hand, it exonerated the carrier, without need of stipulation, from liability for loss due to errors of navigation or in the management of the vessel, or from other causes beyond its control, if it had used due diligence to make the vessel seaworthy.

The Harter Act was salutary. It was approved by the maritime world, and led to a movement for the general adoption of its principles. This movement resulted in the Hague Rules of 1921. These, however, were left to the carriers to accept or reject as they pleased, and failed to achieve the end of uniformity. What was needed was compulsory compliance. By the Brussels Convention of 1924 the signatory nations agreed, by appropriate legislation to make the Hague Rules, somewhat revised in form, compulsory within their jurisdictions. In the United States this legislation, in 1936, took the form of the Carriage of Goods by Sea Act. This Act has as yet received little judicial consideration. It apparently broadens the carrier's exemption from liability for unseaworthiness attributable to lack of due diligence, limiting recovery to damages caused directly by the unseaworthiness. The Harter Act, as construed by the courts, made the carrier liable where there was lack of due diligence even though the unseaworthiness was in no way the cause of the damage.

A bill of lading ordinarily provides for the particular statutes or maritime rules by which it is to be governed. This provision of the bill is known as the clause paramount. This clause is the subject of the author's first chapter. He discusses the nature and extent of the carrier's rights and liabilities under the Harter Act and under the Carriage of Goods by Sea Act. There is still left to the Harter Act, at the option of the carrier,

a certain field of operation, but Mr. Deutsch's conclusion is that the clause paramount should provide that the Carriage of Goods by Sea Act should control, regardless of any option.

The succeeding chapters deal with the law as to receipt and condition of the cargo, voyage and deviation clauses (a highly technical topic, well expounded), liability for deck cargo, the valuation clause, the notice, claim, and time-for-suit clauses, the both-to-blame collision clause and finally the Jason clause. Under each of these headings Mr. Deutsch gives a careful analysis of the subject and a survey of the decisions, with a brief but sufficient summary of the facts upon which they turned. If he makes little attempt to reconcile the decisions in their diversity it is perhaps the wiser course, leaving the reader to his own conclusions.

ARTHUR M. BROWN.

Boston.

Federal Income Tax, by Roy G. and Gladys C. Blakey. 1940. New York: Longmans Green. Pp. xvii, 640.—In one substantial volume this work traces the economic and political background and the legislative history of our income taxes from the Civil War taxes through the Internal Revenue Code and the Act of 1939. This background and history, assembled in detail as to each Revenue Act, bears every evidence of having been painstakingly shifted and checked. The material in this portion of the book has never been collected as well or in a single place and it should prove indispensable to the future students who will be tempted to go beyond the authors in setting out in even more detail the tangled motives and maneuvers that have been expressed in our income tax legislation. Fortunately, the period covered is long enough to dispel some cynicism as to the "intent of Congress" as expressed in such legislation and to assure the doubter that considerable progress toward achieving equity has been made, even though in the process the acts have become so complicated that they are nearly impossible to comprehend as a whole.

Of much greater interest to the reader than the detailed discussion of the different Revenue Acts will be, however, the authors' exposition of the development of three major topics: i.e., (1) what is taxable income; (2) rates and exemptions; (3) administration of the law, and a resulting discussion of some basic problems of the income tax. The discussion of concepts and trends in the definition of taxable income might have been much amplified and enriched by the immense variety of illustrations to be found in rulings of the Bureau and decisions of the Board of Tax Appeals and the courts which have cut a cross section through almost every human activity during the period in which we have had the income tax. Even as an outline, however, this chapter is provocative and edifying, and it may be fairly said that this discussion and the summary of the role or function of the income tax should contribute to an understanding and a fair solution of these two basic questions which must be continually in mind and continually re-examined as conditions change. The volume is likely to be required reading for others who also seek the answers and a clarifying step in the authors' further search, which it is hoped will be continued. This is still important frontier country which is being explored, and it seems likely to be both important and frontier for a long time. This book is certainly one which aids in that exploration.

FOREST D. SIEFKIN.

Chicago.

Corporation Taxation and Procedure in Pennsylvania, by Leighton P. Stradley and I. H. Krekstein. 1940. Chicago: Commerce Clearing House. Pp. 469.—Generally speaking, there are three types of taxes imposed upon corporations, both domestic and foreign by the State of Pennsylvania.

The bonus tax in the case of domestic corporations is a tax imposed upon the stated value of the entire capital stock. In the case of foreign corporations it is a tax on the amount of capital employed in Pennsylvania, but after a corporation has paid a tax on a certain amount employed in Pennsylvania there is no further tax due until such time as the amount of capital employed in Pennsylvania is increased.

Domestic corporations are also subject to what is called the capital stock tax. This is in effect a property tax and is determined on the basis that the assets in Pennsylvania bear to the total assets times the value of the capital stock.

In the case of foreign corporations, Pennsylvania imposes a franchise tax based upon the value of the capital stock of the company employed in Pennsylvania, which is determined by the use of the three-way formula: that is, sales in Pennsylvania to total sales, property in Pennsylvania to total property, and wages and salaries paid in Pennsylvania to total wages and salaries paid.

Pennsylvania also has a corporate net income tax. The net income assignable to Pennsylvania is allocated on the basis of the three-way formula.

Taxpayers in Pennsylvania have never been able to determine just how the Department of Revenue of the State of Pennsylvania determines the value of the capital stock of a corporation and there has been considerable confusion as to what should be classified as property in Pennsylvania in the property fraction, for the reason that the Pennsylvania Department of Revenue rules that the unpaid balance due on bailment leases and conditional sales contracts is property of the vendor. If the unpaid balance is to be classified as property, the question is then raised as to whether this amount should be excluded from sales and, likewise, whether the amount of income realized from such unpaid balance should be excluded from income.

There are quite a few problems which confront taxpayers in Pennsylvania. The authors of this book, in this reviewer's opinion, have merely shown how the Department of Revenue arrives at the tax and have not attempted to advise the taxpayer as to how he should complete his return nor have they attempted to answer any of the questions which ordinarily confront the taxpayer. The book is an excellent resume of the workings of the Department of Revenue and will inform the taxpayer how his tax is computed. However, it does not answer the taxpayer's many questions concerning these taxes.

R. E. MCDOWELL.

Chicago.

Wigmore on Evidence, by John H. Wigmore, 1940, Third Edition. Boston: Little Brown & Co.

This work is justly entitled "A Treatise on the Anglo-American System of Evidence in Trials at Common Law." It appears in the 3rd and final edition, in ten volumes, thirty-six years after the first edition. A review of this book, in the ordinary sense, is uncalled for; it would be something like writing a review of Blackstone's Commentaries long after they had become world-famous. This work, however, is a noteworthy event in the law-book world. It is a finished product on the Law of Evidence representing a half century of work by a master of the law.

Wigmore is a philosopher, as well as a lawyer. In the Preface to the first edition of this work he says:

> "In the Ninth Book of the Analects of the Confucian Sage this saying is recorded: 'The Master said: There are some persons with whom we may pursue our studies in common, yet we shall find them unable to progress to general principles. Or, if they attain to principles, we shall find them unable to accept a common understanding of them. Or, if they reach this common understanding, we find them unable to use the principles with us in their applications.' This saying comes true, often enough, for our profession of the law."

That quotation, originally written nearly forty years ago, is not without interest for the lawyer of 1940. We may paraphrase both Confucius and Wigmore and say:

> Many lawyers show by their actual work that they do not understand the basic principles of logic. They cannot, for example, always proceed surely from the *general* to the *particular*. And therefore they cannot always be relied on to apply a general principle of law to a concrete case, in an acute and accurate fashion.

That is a criticism which cannot be made of Wigmore. He is not only a scholar of the law but he is a skilled logician. The headings and subheadings of this work (which runs to 93 chapters and 2600 sections) proves this. A graphic instance of his sense of logic and analysis, is found, for example, in his Table of Contents. The "Tabular Analysis of Book I (Admissibility)," is a perfect example of good Legal Classification.

More than thirty years ago, when this writer was in a law school, he first heard of Wigmore. His was already a conjuring name in the profession. That statement is literally true, since that word means *something to swear by*. That is exactly what Wigmore's "Evidence" has been for more than a generation.

The list of his "Other Books" which is given in the frontispiece, is interesting. In 1889 over half a century ago, appeared "The Australian Ballot System, 2nd edition"; and it is still a standard work among election lawyers. Over forty years ago he brought out the 16th edition of "Greenleaf on Evidence." His "Panorama of the World's Legal Systems" in three volumes, which appeared in 1928, is recommended as interesting side-reading for any lawyer.

Wigmore has always been a writer of Prefaces. He once said to this writer: "It is highly pleasing to find someone who has read the Prefaces; for I did take pains with them." It may be said in this connection that Prefaces in good law books are much overlooked. Frequently, as in Wigmore's case, they are the key which unlocks much of the wisdom in the main book. Thus the Preface to the first edition of this work which appeared in 1904, sets out the three aims of the book:

1. "To expound the law of Evidence as a system of reasoned principles and rules."

2. "To deal with the apparently warring mass of precedents as the consistent product of these principles and rules."

3. "To furnish the materials for ascertaining the present state of the law."

As to the first aim, he says in a sort of summary:

> "The rules of Evidence, as recorded in our law, may be said to be essentially rational. The reason may not always be a good one, in point of policy. But there is always a reason."

As to the second aim, he says that some may think its application to the law would require "the forcible methods of a Procrustes." The Procrustean method is not unknown to law book writers. Practicing lawyers often favor it in their briefs. Even judges are not entirely without fault according to Wigmore, for he says in this same Preface:

> "A recent President of the American Bar Association has criticized the present conditions in radical language: 'A judge may decide almost any question any way, and still be supported by an array of cases. Cases are our counters, and there are no coins. Our legal arguments are for the most part a mere casino-like matching and unmatching of cases, involving little or no intellectual effort. The law is ceasing to be a question of principles, and is becoming a mere question of patterns.'"

There was another Preface by Wigmore, a much longer one, in the Second Edition of "Evidence" which appeared in 1915. There the Bench and the Bar both got such a scoring for their lack of "Legal Scholarship" as they have not had in many a day. That Preface is omitted in the finished work, and probably wisely. The author is now more optimistic, for he says:

> "The chief impression, remaining in the Author's mind on the completion of this Edition, is that the state of the law of Evidence at the period of this Third Edition, in contrast with the period of the Second Edition, is forward-looking."

And yet we lawyers must not be too much puffed-up by this compliment about the "forward-looking" aspect of our work in 1940, for Wigmore concludes his Preface by saying:

> "It is a pity that the book has had to be so large. But if Legislators will continue so copiously to legislate, and if Judges still refuse to justify with jejunity their judgments, shall not Authors continue assiduously to amass and to annotate these luciferous lucubrations for the benefit of the Bar, so long as the Bar incumbently bears this burden?"

We have said that this work could hardly be reviewed in the ordinary sense, and we think we have proved that point. But no practicing lawyer in the United States can afford to remain unfamiliar with this great source book and final authority on the Law of Evidence.

URBAN A. LAVERY.

Chicago.

AMERICAN BAR ASSOCIATION JOVRNAL

LAWYERS AND NATIONAL DEFENSE

Last month we spoke of "Lawyer Soldiers" and the part that they are to play in the building and training of an army for military defense, against those who have laid Europe waste, stolen the land and property of peaceful nations and murdered unarmed civilians. The movement for military preparedness so complete and so formidable, that all the world's thieves will not dare to attack us, is the nation's first duty. In the performance of that duty, the younger members of our profession will be found learning how to meet and overwhelm the sinister forces of tyranny on land and sea, and in the air, opposing them with better weapons, better tanks and better planes than those which the genius of Autocracy has devised.

Of that form of National Defense we have spoken before, but here we speak of the defense of our Democratic form of Government and of the way of life which we love.

Swiftly the bar has mobilized itself to care for the interests of those who have been and will be called for military training and, if need be, for military service. Now comes the mobilization of the bar for the defense of those principles and those institutions which distinguish Democracy from Autocracy.

In this sector of defense our weapons are mental and spiritual. We need only to convince all our own people that our form of government suits our own needs better than other forms of government.

The most characteristic element of Democracy is Justice. The lawyer is specially qualified to demonstrate that untrammeled justice is to be preferred to anything that Nazism, Fascism or any other form of Absolutism has devised. If there be particulars in which Justice can be made available to all more easily, more swiftly, and more certainly, the lawyer is also specially qualified to point out methods for the accomplishment of that purpose.

The defense of Democracy and of the American way of life is one of the tasks which President Lashly has chosen as the central activity of his administration and to which the American Bar Association will devote its best efforts. In another column is an outline of his plan. Next month Judge Parker will elaborate the text of his call to his committee, "The preservation of democracy depends upon the improvement of the democratic processes."

During the present emergency, others of our leaders in the great task of the "total defense" will present in the columns of the JOURNAL applications of that text to other essentials of our democratic form of government.

ENACT THE WALTER-LOGAN BILL

It is earnestly to be hoped that the present session of the Congress will enact the Walter-Logan bill, which has been so strongly supported by the American Bar Association through its House of Delegates and its Committee on Administrative Law.

It is an anomalous situation that such a measure, which passed the present House by a non-partisan vote of 282 to 97 and passed the Senate without a dissenting vote, has not yet come to the stage of enactment into law. When the bill was reported favorably by a vote of 16 to 2 in the Judiciary Committee of the Senate, its passage followed, without protest and without roll-call, in July of 1939. A few days later, the Majority Leader asked that the bill be reconsidered and put back on the calendar. Friends of the bill asked for agreement that it would soon be brought to a second vote. Senator Barkley said, on August 1, 1939:

> "It is entirely satisfactory to my colleague [Senator Logan] that the vote by which that bill passed be reconsidered . . . with the understanding that the measure be taken up at some date early in the next session."

Senator Logan's championship of his bill was ended by his deplorable death. He was a former Chief Justice of the highest Court of Kentucky, a lawyer whose constructive liberalism was never open to challenge. He stated the basic purpose of his bill.

> ". . . To stem and, if possible, to revise the drift . . . which, if it should succeed in any substantial degree in this country, could but result in totalitarianism, with complete

destruction of the division of governmental power between the Federal and state governments. . . ."

The American Bar Association has urged the bill as a needed step to fortify and assure due process of law, in matters where the rights of citizens are brought in issue by government before government's own agencies as fact-finding tribunals. It has never been claimed that the Walter-Logan bill embodies all of the legislation which experience may show to be advisable in this field. That the bill embodies sound fundamentals which are jeopardized by the long delay in its enactment, there can be no doubt. Its passage by the Senate is deemed likely if a vote is permitted, with full attendance.

Lately there has been suggestion that the bill ought not to be acted on until a report is forthcoming from the Attorney-General's Committee on administrative procedure. Chairman Acheson of the Committee told the American Bar Association in Philadelphia on September 10th that "it is our hope and expectation that we shall conclude our work and our report before the end of this year." In its preliminary report to the Attorney General on January 31, 1940, the Committee stated that its "program contemplates submitting its final report and recommendations to you in the Fall of this year."

Beyond a doubt, this Committee has done in thorough fashion an invaluable and highly needed work. Its preliminary brochures were of notable quality. But its report is not as to the Walter-Logan bill, and will be valuable and significant if the fundamental measure supported by the Association has meanwhile become law.

In the presence of necessary expansions of the scope and activities of administrative agencies under the pressure of National Emergency, it is important that the Walter-Logan bill be passed now.

THE PRACTICING LAWYER AND VALID LEGAL SCHOLARSHIP

The characteristic difference between legal "research" as conducted by the practicing lawyer, in what may be called the uncharted areas of the law, and research in other fields, is this: In Medicine, in Industry, in Education, research is primarily concerned with seeking after valid truth and knowledge, without regard to purpose or motive: while the research of the lawyer is, under the pressure of necessity, a drive to establish, in a particular law suit, the contention of a client. This characteristic approach of the practitioner to the deeper problems of the law, is probably inherent and inevitable; and moreover, it is not as bad as it sounds, since equally competent practitioners are busy with research in support of the other side of the question. The court stands guard against the aberrations in legal theory which thereby result and may be relied on to correct this *ex parte* influence on the law. If adroit and powerful advocates are sometimes able to lead the court to a wrong conclusion, it is, in the long run, set right by a higher court, aided in no small measure by the impartial scholarship of the teaching branch of our profession.

But this cleavage between the main purposes of legal research as practiced by lawyers, and research in other professions and fields should be recognized if the Bar is to be alert and forward-looking. This *ex parte* point of view of the lawyer deserves his cogitation and reflection. It is a factor which has affected the standing of our profession in the eyes of the world ever since Biblical days. The lawyer has always been considered smart and able but always is looked upon as the propagandist for one side. That judgment will continue to affect our standing, and particularly our scholarship as compared to that in other professions, in spite of all that we may do.

In the future progress of Civilization there are great fields of the law—such as Labor law, Industrial law, and Administrative law—which are yet to be fully etched-out and accurately surveyed. The major part of this work must be done by practicing lawyers in their daily work in court. It is a field for the soundest legal scholarship and for a real service to the common good.

Here is a thought which challenges the reflective lawyers of our time. Can we, in some way, set up some comparable research laboratories for the law? Is this not being done in some measure by the Institutes for practicing lawyers which our bar associations are now conducting with marked success? The legal scholarship of the practicing lawyer is acute and searching. But what is to be said of it with respect to what we have called the search for Valid Legal Truth? The lawyers of today are in the forefront in all matters that concern public service and national defense. But it is a fair question to ask: Is the practicing part of our profession doing its full duty in all respects in the great March of Civilization that is so characteristic of the era in which we live; or is it lagging behind in some respects in the field of valid legal scholarship?

JUDICIAL ADMINISTRATION AND NATIONAL DEFENSE*

A Timely Opportunity for the Bar to Contribute to National Defense through Improving the Channels of Justice.

By Hon. Jacob M. Lashly
President, American Bar Association

THE chief emphasis in the work of the American Bar Association this year is, and should be, national defense. By national defense it is not meant that the federal government, through its agents and employees, will be able to build a mechanized ring about and over the nation within and under which the people may live in security while pursuing their business or work or enjoying their leisure as in ordinary times. If there is any message in the collapse of France, it is that preparedness means more than armies and equipment, much more. If we are to profit ever so little by the tragic lessons to be read in the fate of other non-warlike and peaceful nations which have fallen, and are being reduced to wreckage and enslavement, we will know that there must be no weakness here; that the army, navy and air services must be supported by a solidarity and oneness of purpose through which the nation will be able to strike a blow for defense when the critical hour comes which will represent the maximum of our strength and our will to survive.

In order to promote the most effective contribution to the national defense of which the organized bar is capable, the Association proposes this year to group all of its *pro bono publico* activities around that central purpose.

The special Committee on National Defense, with headquarters in Washington, has developed and is rapidly expanding its aid services to trainees and those directly affected by their induction or enlistment, and its coordinating work with the war services of the government which is beginning to operate the first peace time selective service draft within our history.

American lawyers will undoubtedly continue to render legal aid, and to stand by to help troubled persons unable to employ trained advisers in the course of the day's work in and out of their offices. Services such as these upon the part of individual lawyers everywhere have been multiplied and increased by the exigencies and emotions engendered by the perilous state of world affairs. If computation were possible, the aggregate of these separate and continuing benefits would be very great, both in volume and value. But it is not enough. The men of our profession, because of their special training and, also, because of the unusual opportunities afforded by the commanding positions occupied by them in their various communities, are better qualified for leadership than others in affairs of law or government. In the epoch of transition in which we know ourselves to be, these fields constitute the most important factors which now are influencing the lives and destinies of people. It is the time for the assertion of leadership upon the part of the organized bar at these strategic points of turning.

It is through no strained or artificial arrangement of the various units of the Association engaged in activities described as *pro bono publico* that all are tied in to the core of national defense. The preservation of our institutions of equality, liberty, and justice—the translation of democracy into terms, practices, and life habits which will promote self-reliance, cooperation, contentment, and security lies at the very foundation of defense. I shall not labor the premise by enumerating the sections and committees of the Association working now in separate and distinct Associational enterprises devoted wholly to the public interest, each one of which is bringing up its separate contribution to national defense. Their efforts and work when unified will round out a distinct structure at the end of the year. It is for the purpose of inviting especial attention and recommending the hearty support and cooperation of all members of the Bench and Bar to one of the most significant of these that this message is prepared. It is that of Judicial Administration.

Justice is a basic characteristic of Democracy. Even more than liberty, more than equality, more than any one of the integral parts to be found in the American plan of government, justice—the elemental principle of fairness between man and man, and between Government and citizen, is essential to the success of life as we wish to live it. It is the distinguishing feature between Democracy and Dictatorship.

That our own country has entered upon an era of pragmatism in which principle often is sacrificed to efficiency or expediency is known to thinking people of all walks of life. Many of those who advocate a mild form of executive absolutism; most of the apologists for administrative freedom from judicial review, ground their contention upon the claim that the judicial process is ineffective to get the business of the people done; that it is slow, complicated, antiquated and obscure. Numbers of people are being persuaded that sound precedent and certainty in the solution of justiciable problems are less important than quick action in doing the will of the majority at a given time. It is but a short stride to the conclusion that individual justice is of secondary importance or even that it is immaterial, and that the decisions of some person or selected group arbitrarily arrived at, as to what is best for the social order or the economic security, are acceptable as the law of the land. Thus justice is sacrificed on practical grounds. It must be obvious to all that leadership in the correction of such modern misconceptions must be assumed by the organized bar. No other group could be quali-

*This is the first of a series of articles to appear in the Journal on the general subject of improving the administration of justice throughout the country as a part of the National Defense Program.

fied, or so well qualified, as the Bench and Bar to come to grips with these dangerous heresies. But in order to do so the implements used in the administration of justice must be reexamined repeatedly and kept in order through unremitting attention from those who use them.

In the Association year of 1937-38 the Section of Judicial Administration launched what deserves to be known as an historic movement for the stimulation of comprehensive reforms in the procedure of the courts in the several states. The program adopted involved the appointment of seven main committees, to each of which was assigned a special subject in procedure for study and development. Advisory and consulting members were provided for these committees in every state. Great interest was aroused among the state and local associations as well as among individual lawyers in every section of the country, and the reports of the Section and of the chairmen of the seven committees reveal an extraordinary accomplishment in setting up and pushing forward the work within a single year. In accordance with the recommendations included in those reports, local committees were established in each of the states and the District of Columbia by the President in the next succeeding year for pressing forward with the project. Again a pattern was prepared and enthusiasm furnished to the state and local associations by the American Bar Association, and the reports of the Section at the end of the year showed gratifying activity and interest in this important movement throughout the country. The adoption of the federal rules of procedure, the interest engendered in their meaning, application and use by means of many legal institutes and other forms of study upon the part of the bar proved to be of great aid in the work with legislative bodies. During the third year of these great undertakings, the Junior Bar Conference undertook to make a survey of the results which so far could be seen to have been achieved in the various states where the procedural reform program, or some part of it, had been presented to the legislature, so that the work could be appraised and such improvements could be adopted in the working plans as experience should show to be required. The National Conference of Judicial Councils provided the expenses for the survey and thus stood sponsor for its prosecution. While the survey has not as yet been completed, it seems necessary to press forward with the major work this year. The greater number of the states are to hold legislative sessions beginning in January, 1941, and the needs of the field are so emergent in character that no delay seems tolerable. With the view of pressing the campaign at all fronts the House of Delegates at the Philadelphia meeting authorized the appointment of a special committee to coordinate all of the agencies of the Association whose work lies within this circle of interest. The President, at the direction of the Board of Governors, appointed a representative special committee, in order to carry out this mandate, headed by John J. Parker, Chairman, and Paul B. DeWitt, Secretary. The other members of the Committee consist of the following: Edward R. Finch, Chairman National Conference of Judicial Councils; James W. McClendon, Chairman Section of Judicial Administration; James J. Robinson, Chairman of Section of Criminal Law; David A. Simmons, President American Judicature Society, and Burt J. Thompson, Chairman Section of Bar Organization Activities.

Through the means of this composite committee it is believed that the greatest degree of coordination of effort can be expected. At a recent meeting of the Committee held at Washington, attended by all of the members and also a number of invited conferees having concern for and experience with the subject of improvement in the judicial process, plans were laid for a vigorous and thorough prosecution of the work so well begun. Chairmen for the various states were agreed upon, many key men, known to those present to be devoted and effective, were selected and to them is to be intrusted the duty and given the opportunity of building upon the structure already standing in every state.

It would be hard to conceive a better or more patriotic service which any lawyer in practice or in the work of legal education, or any member of the Judiciary branch of the Government, could render to his country and to its institutions of justice, equality and liberty than to give what aid he may be able to give in the furtherance of this great enterprise in the community of his home. These are the fundamentals of Democracy. Their preservation is the very objective of National Defense.

The Unconquerable Spirit of the City of London

(*Written by Thomas Sprat, Bishop of Rochester, after the Great Plague and the Great Fire, A. D.* 1666)

"THE *Plague* was indeed an irreparable Damage to the whole Kingdom; but that which chiefly added to the Misery was the *Time* wherein it happened. For what could be a more deplorable Accident than that so many *brave Men* should be cut off by the *Arrow that flies in the dark*, when our Country was engaged in a *foreign War*, and when their Lives might have been honourably ventured on a glorious Theatre in its Defence? And we had scarce recovered this *first Misfortune* when we received a *second* and a deeper Wound; which cannot be equalled in all *History*, if either we consider the Obscurity of its *Beginning*, the irresistible Violence of its Progress, the Horror of its *Appearance, or* the Wideness of the Ruin it made, in one of the most renowned *Cities* of the World.

Yet when, on the one side, I remember what *Desolation* these Scourges of Mankind have left behind them; and on the other, when I reflect on the *Magnanimity* wherewith the English Nation did support the Mischiefs; I find that I have not more Reason to *bewail* the one than to *admire* the other.

Upon our Return after the abating of the *Plague*, what else could we expect but to see the *Streets* unfrequented, the *River* forsaken, the *Fields* deformed with the *Graves* of the *Dead*, and the *Terrors* of *Death* still abiding on the Faces of the living? But instead of such dismal Sights there appeared almost the same Throngs in all publick Places, the same Noise of *Business*, the same Freedom of Converse, and, with the Return of the *King*, the same Cheerfulness returning on the Minds of the *People* as before.

Nor was their *Courage* less in sustaining the *second Calamity* [the Great Fire], which destroyed their *Houses* and *Estates*. This the greatest Losers endured with such undaunted Firmness of Mind that their Example may incline us to believe that not only the best *Natural*, but the best *Moral* Philosophy too, may be learned from the Shops of *Mechanicks*. It was indeed an admirable Thing to behold with what *Constancy* the meanest Artificers saw all the *Labours* of their *Lives* and the *Support* of their *Families* devoured in an instant. . . ."—(Printed in the *Oxford Book of English Prose*.)

REVIEW OF RECENT SUPREME COURT DECISIONS

By Edgar Bronson Tolman*

Labor Law—National Labor Relations Board—Extent of Authority

The National Labor Relations Act is essentially remedial and does not authorize the imposition of penalties or fines in vindication of public rights.

Republic Steel Corporation v. National Labor Relations Board. (85 Adv. Op. 1, Sup. Ct. Rep. — No. 14, decided Nov. 12, 1940.)

The National Labor Relations Board found that the Republic Steel Corporation had engaged in unfair labor practices, ordered the company to desist from those practices, to withdraw recognition from a labor organization found to be dominated by the company, and to reinstate certain employees with back pay. The Board directed the company to deduct from the amount due for back pay, amounts which employees had received for work performed upon "work relief projects" and to pay those amounts to the appropriate governmental agencies.

Review was sought by the employer because of alleged conflict with decisions in the Second and Ninth Circuits. The writ of certiorari was granted, limited to the question whether the Board had the authority to require the employer to make the reductions and payments above referred to. The opinion of the Court was pronounced by the Chief Justice.

As to the earnings of the discharged employees before their reinstatement the Court said:

> The amounts earned by the employees before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employees whole. That principle would apply whether the employees had earned the amounts in public or private employment. Further, there is no question that the amounts paid by the governmental agencies were for services actually performed. Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid. There is no finding to the contrary.

The Board sought to justify its order because the work relief program was designed to meet the exigency of large scale unemployment produced by the depression and that the projects had been conducted as a means of dealing with relief caused by unemployment; that therefore the unfair labor practices of the company occasioned losses to the government financing the work relief projects.

It was declared that the payments to the governmental agencies were thus conceived as being required for redressing an injury to the public and the question was therefore propounded by the Court, "Has Congress conferred the power on the Board to impose such requirements?"

On this point the Chief Justice said:

> We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

As the sole basis of its authority the Board relied upon and cited the language of Section 10(c), that where unfair labor practices were found the Court might issue an order—

> "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

As to the interpretation of that provision the Chief Justice said that the language "should be construed in harmony with the spirit and remedial purposes of the Act"; that Congress did not intend to vest in the Board "a virtually unlimited discretion to devise punitive measures" and thus to prescribe penalties or fines which the Board might think would effectuate the policies of the Act. Cases were cited in which the Court had previously made similar declarations of the lack of a punitive idea in the Labor Relations Act. The Chief Justice said:

> . . . it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

The opinion closed with the following paragraph:

> In truth, the reasons assigned by the Board for the requirement in question—reasons which relate to the nature and purpose of work relief projects and to the practice and aims of the Works Project Administration—indicate that its order is not directed to the appropriate effectuating of the policies of the National Labor Relations Act, but to the effectuating of a distinct and broader policy with respect to unemployment. The Board has made its requirement in an apparent effort to provide adjustments between private employment and public work relief, and to carry out supposed policies in relation to the latter. That is not the function of the Board. It has not been assigned a rôle in relation to losses conceived to have been sustained by communities or governments in connection with work relief projects. The function of the Board in this case was to assure to petitioner's employees the right of collective bargaining through their representatives without interference by petitioner and to make good to the employees what they had lost through the discriminatory discharge.
>
> We hold that the additional provision requiring the payments to governmental agencies was beyond the Board's authority, and to that extent the decree below enforcing the Board's order is modified and the cause is remanded with directions to enter a decree enforcing the Board's order with that provision eliminated.

Mr. Justice Roberts took no part in the consideration of the decision of the case.

Mr. Justice Black and Mr. Justice Douglas dissented and the basis of their dissent is indicated by the following excerpts from the dissenting opinion:

> It might fairly be implied by the words "reinstatement

*Assisted by James L. Homire and Leland L. Tolman.

of employees with or without back pay" that the employees must themselves be the recipients of the back pay. Were the opinion based on that ground we would acquiesce. But the judgment here does not rest upon such an interpretation. The holding appears to be on the broad ground that the Board may not require full back pay, even to a wrongfully discharged employee, if he has received pay for services performed on a governmental relief project provided exclusively for the needy unemployed. With this conclusion we cannot agree. . . .

We believe, as did the Board and the court below, that it may well be said that the policies of the Act will be effectuated by denying to an offending employer the opportunity of shifting to government relief agencies the burden of supporting his wrongfully discharged employees. The knowledge that he may be called upon to pay out the wages his employees would have earned but for their wrongful discharge, regardless of any assistance government may have rendered them during their unemployment, might well be a factor in inducing an employer to comply with the Act.

Class Suit—Res Judicata—Due Process

When the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata is challenged for want of due process, the course of procedure in both litigations must be examined to ascertain whether the litigant whose rights have been thus adjudicated has been afforded the notice and opportunity to be heard which the due process clause of the constitution prescribes.

Hansberry v. Lee (85 Adv. Op. 11, Sup. Ct. Rep. — No. 29, decided Nov. 12, 1940).

Mr. JUSTICE STONE defined the constitutional question here involved as follows:

> The question is whether the Supreme Court of Illinois, by its adjudication that petitioners in this case are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment.

It should be noted that the question involved only the application of the doctrine *res judicata*. That doctrine was discussed as applicable to all persons.

An agreement had been executed by owners of certain residence property in Chicago that for a specified period no part of the land should be "sold, leased to or permitted to be occupied by any person of the colored race," and provided that it should not be effective unless signed by the "owners of 95 per centum of the frontage" within the described area.

This action was brought in the Circuit Court of Cook County, Illinois by owners of land in the restricted area to enjoin the breach of that agreement. The complaint averred that the owners of 95 per centum of the frontage had signed; and that the complainants were owners of lands within the restricted area who had either signed the agreement or acquired land therein from others who had signed; that defendants, persons of the colored race, had acquired and were occupying land in the restricted area formerly belonging to an owner who had signed the agreement. The defendants pleaded that the agreement had never become effective for lack of signature of the required 95 per centum. The plaintiff pleaded that that issue was adjudicated by the decree in an earlier suit. To this the defendants rejoined that they were not parties to the suit nor bound by its decree and that denial of their right to litigate the issue of the validity of the agreement would be a denial of the due process of law, guaranteed by the Fourteenth Amendment.

The Circuit Court found that only about 54% of the frontage owners had signed the agreement; that the finding in the prior case had been supported by a stipulation of the parties which was false and fraudulent, but it ruled that the issue of signature by the required percentage of owners was *res judicata* and entered a decree for the plaintiffs.

The Supreme Court of Illinois affirmed.

Certiorari was granted to resolve the constitutional question.

The Supreme Court of Illinois upon examination of the record in the prior case (the one relied upon as an adjudication in favor of the plaintiffs in the state court), found that that suit was brought by an owner in the restricted area to enforce the agreement against four named individuals who had acquired an interest in a portion of the prescribed land formerly owned by another signer of the agreement and who were contesting obligation thereunder; that by stipulation in that suit the trial court had found that the agreement had been signed by 95% of all the frontage owners and that the trial court in the prior suit found the agreement to be in force, that it was a covenant running with the land; binding all the land within the ascribed area owned by the parties to the agreement and those claiming under them, including the defendants; and that in the prior suit a decree was entered restraining the breach of the agreement by the defendants and by those claiming under them. The Supreme Court of Illinois found that the stipulation on the prior suit was untrue, but held that it was not fraudulent or collusive.

In the instant case the state Supreme Court concluded that the prior case was a "class" or "representative" suit and that in such a suit "where the remedy is pursued by a plaintiff who has a right to represent the class to which he belongs other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings," that the defendants in the instant suit were members of the class represented by the plaintiff in the prior suit and consequently were bound by its decree; that the trial court in the earlier suit had jurisdiction to determine the fact as between the parties before it and that its determination, even though erroneous, was binding upon the parties in the second suit until set aside by direct attack upon the first judgment. Applying the law to these facts MR. JUSTICE STONE said:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

Reference was made to *Pennoyer v. Neff* in support of the statement that in Anglo-American jurisprudence it is a principle of general application that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party and to which he has not been made a party by service of process, and it is declared that a judgment made under those circum-

stances is not entitled to the full faith and credit which the Constitution of the United States prescribes.

Passing from that fundamental proposition the Court took up the discussion of the recognized exception to those general rules and declared that to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit to which some members of the class are parties, or those represented, may bind members of the class who were not made parties to it.

MR. JUSTICE STONE then proceeded to consider the origin, nature and extent of that exception saying:

> The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the former fairly represent the latter in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. . . .
>
> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, . . . or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. . . .

Following the discussion of the fundamental principles and the exceptions thereto the Court passed to the application of those rules to the record in the instant case and said:

> The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the several obligations of the signers and those claiming under them. The promises ran severally to every other signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it. If those who thus seek to secure the benefits of the agreement were rightly regarded by the state supreme court as constituting a class, it is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation. . . .
>
> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. . . .
>
> The plaintiffs in the *Burke* case sought to compel performance of the agreement in behalf of themselves and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others. In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance. The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others, and even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge.

The judgment of the Supreme Court of Illinois was accordingly reversed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE ROBERTS and MR. JUSTICE REID concurred in the result.

Taxation—Income Tax—Exemption of Gains From Dealings In Farm Loan Bonds—Revenue Act of 1928

In computing taxable income under the Revenue Act of 1928, gains from the purchase and sale of Farm Loan Bonds must be included as income.

The exemption from the income tax, provided for in Section 26 of the Federal Farm Loan Act of "income derived from" Farm Loan Bonds, is limited to interest and does not extend to gains realized from dealings in securities of that character.

United States v. Stewart, 85 Adv. Op. 25; — Sup. Ct. Rep. —, (No. 13, decided November 12, 1940).

The question in this case was whether gains realized from the sales of securities of Joint Stock Land Banks are exempt from the income tax under the Federal Farm Loan Act of 1916. The Commissioner held that the gains were taxable income. The respondent included them in his income tax return for 1931 and claimed a refund. The claim was disallowed and suit for the refund was instituted. The District Court held that the gains were taxable income, but this was reversed by the Circuit Court of Appeals. On certiorari the latter ruling was reversed by the Supreme Court in an opinion by MR. JUSTICE DOUGLAS.

The Revenue Act of 1928 in Section 22(a) includes income "derived from . . . sales or dealings in property, whether real or personal." Another provision exempts "Interest upon . . . securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended." These provisions the Court construes as insufficient to support the claimed exemption.

A further provision of the Farm Loan Act contained in Section 26 was relied upon by the respondent. It provides that: "farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation." The respondent urged that the gains in question were "income derived" from the bonds under Section 26.

This contention the Court rejects. A distinction is drawn between income derived from a security and income derived from transactions in that security. In development of this distinction, MR. JUSTICE DOUGLAS says:

> To be sure, "income" is a generic term amply broad to include capital gains for purposes of the income tax. . . . It is likewise true that Congress will be presumed to have used a word in its usual and well-settled sense. . . . But § 26 does not exempt simply "income"; it exempts the bonds and the "income derived herefrom." Analytically, income derived from mere ownership of the bonds is clearly different from income derived from dealings or transactions in the bonds. As stated in *Willcuts v. Bunn*, 282 U. S. 216, 227-228:
>
> "The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transaction on his part. The tax falls upon the owner by virtue of the mere fact of ownership, regardless of use or disposition of the security. The tax upon profits made upon purchases and sales is an excise upon the result of the combination of several factors, including capital investment and, quite generally, some measure of sagacity; the gain may be regarded as "the creation of capital, industry and skill." *Tax Commissioner v. Putnam*, 227 Mass. 522, 531.
>
> True, the *Bunn* case dealt only with the alleged constitutional inhibition against taxation of capital gains on municipal bonds and not with a specific statutory exemption. But its analysis is cognate here as indicating that, in absence of clear countervailing evidence, an exemption of "income derived" from a security does not embrace "income derived" from transactions in that security.
>
> There are no circumstances here which should make the reasoning of the *Bunn* case inapplicable.

The opinion also analyzes and rejects several other contentions advanced by the respondent in support of the claimed exemption. These contentions embrace arguments based upon legislative history of the provisions in question, the administrative interpretation of Section 26, comparisons with other exemption provisions, and representations of the Farm Loan Board. The Court concludes in this connection that the factors urged by the respondent at most create some doubt as to the proper construction of the statute. These were found insufficient to support an exemption from taxation, which must rest on a more substantial basis than a doubt or ambiguity.

MR. JUSTICE ROBERTS voted to affirm the judgment on the grounds stated by the Circuit Court of Appeals in its opinion, 106 F. (2d) 405.

The case was argued by Assistant Attorney General Clark for the petitioner, and by Mr. W. Glenn Harmon and Mr. Ernest L. Wilkinson for the respondent.

Federal Statutes; Sherman Anti-Trust Act Norris-LaGuardia Act—Labor Dispute

In a proceeding under the Sherman Anti-Trust Act, which involves a labor dispute, no injunction temporary or permanent, may issue except on strict compliance with the prerequisites of the Norris-LaGuardia Act. The provisions of that act were intended to limit the issuance of injunctions in labor disputes under the Sherman Anti-Trust Act.

Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc. (No. 20, filed Nov. 18, 1940.)

MR. JUSTICE BLACK speaking for the Court stated the two questions presented in this proceeding as follows:

> First, Does there here exist a "labor dispute" within the meaning of the Norris-LaGuardia Act? Second, If there is a "labor dispute," must the jurisdictional prerequisites of the Norris-LaGuardia Act be complied with before injunctive process can be used against a labor union accused of violating the Sherman Anti-Trust Act?

The proceeding was brought by the Amalgamated Dairy Workers, a CIO affiliate, by two Chicago dairies whose milk was processed and distributed by the members of that labor organization and by a Wisconsin cooperative organization which supplied milk to the plaintiff dairies. The defendants were an A F of L Milk Wagon Drivers Union and its officers.

The distribution of milk in Chicago had for many years been handled by the Milk Wagon Drivers Union, which at the time this litigation was begun had more than five thousand members, but as a consequence of the depression of the early thirties the milk industry suffered like other industries and as a consequence of the reduced ability of consumers to buy, a competitive system sprung up known as the vendor system which involved the sale of milk to retail stores. The new competitive system bore heavily upon the business of the dairies and the milk wagon drivers and in consequence competition led to strife and strife to violence. The retail cut-rate stores were picketed and this suit followed. The petition sought an injunction on the charge that the defendant union and its officials had entered into a conspiracy to interfere with and restrain interstate commerce in violation of the Sherman and Clayton acts and it was contended by plaintiffs that the controversy was not a labor dispute within the meaning of the Norris-LaGuardia Act but an unlawful secondary boycott. The purpose of this was to obtain for the defendant employers a Chicago milk monopoly at a sustained high priced level contrary to the Sherman Act.

The district court found that this was a case involving a labor dispute; that plaintiffs had failed to satisfy the prerequisites of the Norris-LaGuardia Act and that accordingly the court was without jurisdiction to grant either a permanent or temporary injunction, the Circuit Court of Appeals (Seventh) reversed, one judge, dissenting, holding that the case did not grow out of a labor dispute and even if it had the federal court would have had jurisdiction to enjoin even if the Sherman Act had been violated. Certiorari was granted because of the importance of these questions.

As to the existence of a labor dispute, it was held that the complaint on its face was probably sufficient. That on the hearing before a special master the master found that the case arose out of and involved a labor dispute. The district court adopted the findings of the master and made further findings of its own.

In coming to its final conclusion on this question the Court said:

> We agree with the District Court that this case grows out of a labor dispute. Since the requirements of the Norris-LaGuardia Act have not been met, the court did

not have jurisdiction to grant an injunction unless by virtue of that phase of the bill which charged a violation of the Sherman Anti-Trust Act.

The Court of Appeals had concluded that the defendant's picketing activities constituted a secondary boycott in violation of the Sherman Anti-Trust Act and that therefore on that ground alone, regardless of the Norris-LaGuardia Act, the district court had jurisdiction to grant an injunction. This holding of the Circuit Court was declared to be erroneous.

No specific language of the Norris-LaGuardia Act is pointed to in support of the theory that the Act was to be inapplicable where injunctions are sought against labor unions charged with violating the Sherman Act in the course of labor disputes. On the contrary, section 1 of the Norris-LaGuardia Act provides that "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act." This unequivocal jurisdictional limitation is reiterated in other sections of the Act. The Norris-LaGuardia Act—considered as a whole and in its various parts—was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes. And this Court has said that "the legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act."

Reference was made to the reports of the Congressional Committees showing the declared intent of Congress to limit and restrict the issuance of injunctions in labor controversies. It was said that "hostility to 'government by injunction' had become the rallying slogan by many and varied groups." After this review of the legislative history and the citation of leading decisions of the Supreme Court of the United States, the Court concluded:

Whether or not one agrees with the committees that the cited cases constituted an unduly restricted interpretation of the Clayton Act, one must agree that the committees and the Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act. For us to hold, in the face of this legislation, that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress. The Circuit Court of Appeals was in error; its judgment is reversed and the judgment of the District Court dismissing the bill for injunction is affirmed.

Mr. Abraham W. Brussell argued the case for petitioners and Mr. Arthur R. Seelig for respondents.

Taxation—Cost Depletion and Percentage Depletion—Election To Change Basis of Computation—Original Return Defined

To obtain an allowance for percentage depletion under the Revenue Act of 1934 the taxpayer must elect in its first return whether the allowance is to be computed on a cost or a percentage basis. A taxpayer, which files a return in ignorance of the change in the law to permit an allowance for depletion on a percentage basis, may not elect to compute on that basis by filing an "amended" return after the expiration of the time within which an extension for filing a return may be granted by the Commissioner.

J. E. Riley Investment Co. v. Comm. of Internal Revenue, 85 Adv. Op. 35; — Sup. Ct. Rep. —, (No. 50, decided November 12, 1940).

This opinion deals with a question as to the right of the petitioner to an allowance for a percentage depletion in computing its income tax under the Revenue Act of 1934.

The petitioner engages in gold mining at Flat, Alaska. There, the winter mail service is uncertain and slow and the petitioner was accustomed to file its income tax returns on forms prescribed for an earlier year. Consequently, the 1934 return was filed on a 1933 form, executed on January 2, 1935. The return reached the Collector at Tacoma, Washington, on January 29, 1935. When the return was executed the petitioner had no knowledge of the provision of the Act of 1934 allowing percentage depletion. It did know, however, that unless the law had been changed it was not entitled to depletion since it had no basis for cost depletion. It was found further that the petitioner would have claimed a percentage depletion if it had known of the new law. The petitioner first learned of the provision in August, 1935, and on March 3, 1936, it filed an amended return for 1934 which embraced a deduction for percentage depletion. It asked for a refund, but its claim was denied by the Commissioner, the Board of Tax Appeals and the Circuit Court of Appeals. Under the Act of 1934 the taxpayer is required to elect in his first return whether depletion allowance is to be computed with or without regard to percentage depletion and the method so elected governs as to all subsequent taxable years.

The Court, in an opinion by MR. JUSTICE DOUGLAS, affirmed the ruling of the Circuit Court of Appeals and took the view that the amended return was not a "first return" within the intent of Section 114(b)(4) of the Act of 1934. In support of this conclusion, the Court says:

We think that petitioner's amended return, filed on March 3, 1936, was not a "first return" within the meaning of § 114(b) (4). By § 53(a) (1) of the 1934 Act, the return was due on or before March 15, 1935. By § 53(a) (2) the Commissioner was empowered to grant a reasonable extension for filing returns but, so far as applicable here, not exceeding six months. *Haggar Co. v. Helvering*, 308 U. S. 389, would compel the conclusion that had the amended return been filed within the period allowed for filing the original return, it would have been a "first return" within the meaning of § 114 (b) (4). But we can find no statutory support for the view that an amendment making the election provided for in that section may be filed as of right after the expiration of the statutory period for filing the original return.

We are not dealing with an amendment designed merely to correct errors and miscalculations in the original return. Admittedly the Treasury has been liberal in accepting such amended returns even though filed after the period for filing original returns. This, however, is not a case where a taxpayer is merely demanding a correct computation of his tax for a prior year based on facts as they existed. Petitioner is seeking by this amendment not only to change the basis upon which its taxable income was computed for 1934, but to adopt a new method of computation for all subsequent years. That opportunity was afforded as a matter of legislative grace; the election had to be made in the manner and in the time prescribed by Congress. The offer was liberal. But the method of its acceptance was restricted. The offer permitted an election only in an original return or in a timely amendment. An amendment for the purposes of § 114(b) (4) would be timely only if filed within the period provided by the statute for filing the original return. No other time limitation would have

statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative, not a judicial function.

The opinion adds further that strong practical considerations support the construction adopted here.

The case was argued by Mr. Robert Ash for the petitioner, and by Mr. Richard H. Demuth for the respondent.

Taxation—Surtax on Undistributed Profits—Revenue Act of 1936

Section 26(c)(1) of the Revenue Act of 1936 relieving from the general surtax on undistributed profits such dividends as a corporation could not distribute without violating a provision of a written contract executed prior to May 1, 1936, and dealing expressly with the payment of dividends, does not extend to profits earned during the taxable year which, by reason of a previously existing deficit, could not be paid out in dividends without violation of the state law. A state statute thus preventing the payment of dividends is not a provision of a written contract within the meaning of the exemption in the Revenue Act.

Helvering v. Northwest Steel Rolling Mills, Inc., 85 Adv. Op. 21; — Sup. Ct. Rep. —. (No. 121, decided November 12, 1940).

This case involves a question as to the operation of the Revenue Act of 1936 in its relation to corporate profits earned but not distributed during the tax year. The respondent, because of a previously existing deficit, was prohibited by a state law from distributing, as dividends, profits earned in 1936. Section 14 of the Revenue Act of 1936 imposes a general surtax on profits earned but not distributed during the tax year. Section 26(c)(1) relieves from the surtax all undistributed profits which the corporation could not distribute as dividends "without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends."

In the instant case the respondent contended that its corporate charter from the state constituted a written contract prohibiting the payment of dividends under the circumstances. It further contended that if the Act should be construed to deny the credit, it is unconstitutional.

The Commissioner held the respondent liable for the surtax, notwithstanding the state prohibition. The Board of Tax Appeals sustained the Commissioner, but the Circuit Court of Appeals of the Ninth Circuit reversed. On certiorari the Supreme Court reversed the latter ruling and sustained the ruling of the Commissioner and the Board of Tax Appeals, in an opinion by MR. JUSTICE BLACK.

At the outset the opinion emphasizes that the tax in question is one generally imposed and that the respondent's claim is for a credit in the nature of a specially allowed deduction or exemption, and stresses the rule that special tax exemptions are to be strictly construed. In reaching the conclusion that the exemption or credit here claimed does not meet this test, MR. JUSTICE BLACK says:

> Measured by this sound standard it is probably not necessary to go beyond the plain words of section 26 (c)(1) in search of the legislative meaning. Certainly, at first blush, few would suppose that when Congress granted a special exemption to corporations whose dividend payments were prohibited by executed written contracts, it thereby intended to grant an exemption to corporations whose dividend payments were prohibited by state law. The natural impression conveyed by the words "written contract executed by the corporation" is that an explicit understanding has been reached, reduced to writing, signed and delivered. True, obligations not set out at length in a written contract may be incorporated by specific reference, or even by implication. But Congress indicated that any exempted prohibition against dividend payments must be expressly written in the executed contract. It did this by adding a precautionary clause that the granted credit can only result from a provision which "expressly deals with the payment of dividends."
>
> That the language used in section 26(c) (1) does not authorize a credit for statutorily prohibited dividends is further supported by a consideration of section 26(c) (2). By this section, a credit is allowed to corporations contractually obligated to set earnings aside for the payment of debts. That this section referred to routine contracts dealing with ordinary debts and not to statutory obligations is obvious—yet the words used to indicate that the section had reference only to a "written contract executed by the corporation" are identical with those used in section 26(c) (1). There is no reason to believe that Congress intended that a broader meaning be attached to these words as used in section 26(c) (1) than attached to them under the necessary limitations of 26(c)(2).

The opinion recognizes that corporate charters have been held by the courts to be contracts so far as they grant rights, properties, privileges and franchises. It is pointed out, however, that not all provisions of law providing for the grant of franchises are contractual in their nature. It is emphasized here that the duty of the corporation to refrain from distributing dividends in the circumstances presented arose by virtue of a valid law of Washington which was not a grant or written contract.

The Court gives attention also to the respondent's arguments that the tax statute as construed offends the Fifth, Tenth and Sixteenth Amendments. All of these arguments were rejected.

In *Crane-Johnson Co. v. Helvering*, (No. 8, decided November 12, 1940), the Circuit Court of Appeals for the Eighth Circuit had reached a conclusion contrary to the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Northwest Steel Rolling Mills* case discussed above. The ruling in the Eighth Circuit, since it is consistent with the opinion of the Supreme Court in the *Northwest Steel Rolling Mills* case, was affirmed on the authority of the latter.

The case was argued by Mr. Richard H. Demuth for the petitioner and by Mr. Walser S. Greathouse for the respondent in No. 121, and by Mr. John E. Hughes for the petitioner and by Mr. Richard H. Demuth for the respondent in No. 8.

Taxation—Deduction of Individual Losses From Partnership Gains—Revenue Act of 1932

In computing the income of an individual partner, the word "gains" in Section 23(r)(1) includes gains from sales or exchanges of partnership securities which are not capital assets as defined in Section 101. From those partnership gains he may deduct losses from the sale or exchange of personal securities of the same sort.

Neuberger v. Comm. of Internal Revenue, 85 Adv. Op. 16; — Sup. Ct. —, (No. 5, decided November 12, 1940).

This case involves a question as to the deduction of individual losses from partnership gains in determining the taxable income of a member of a partnership.

The petitioner is a partner in a firm trading in securities on the New York Stock Exchange. He executes orders on behalf of the partnership customers. In addition, he trades in securities for his own account. In 1932, the partnership had a profit of $142,802.29 from the sale of securities which were not capital assets as defined in Section 101 of the Revenue Act of 1932. It had other income of $170,830.65 and deductions of $203,981.78, or a net income of $109,651.16. The petitioner's distributive share was $44,158.55. The same year the petitioner had a net loss of $25,588.93 on his private transactions which were not capital assets as defined in Section 101.

In his income tax return for 1932 the petitioner deducted from gross income the $25,588.93 loss. The Commissioner disallowed the deduction and assessed a deficiency. His ruling was upheld by the Board of Tax Appeals. The Circuit Court of Appeals affirmed. On certiorari the judgment was reversed by the Supreme Court in an opinion by MR. JUSTICE MURPHY.

Allowable deductions set out in the Act include in Section 23(r)(1), "Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed [as deductions from gross income] only to the extent of the gains from such sales or exchanges. . . ."

The controlling question was whether in computing the income of an individual partner "gains," as used in the foregoing, includes gains from sales of partnership securities which are not capital assets as defined in Section 101. The Court concluded that the gains from sales of partnership securities are included therein. In an analysis of the statutory intent, MR. JUSTICE MURPHY says:

> The basic and narrow question is whether, in computing the income of an individual partner, the word "gains" in Section 23(r)(1) includes gains from sales or exchanges of partnership stocks and bonds which are not capital assets as defined in Section 101. We are of opinion that it does.
>
> In computing gross income prior to the Revenue Act of 1932, subject to certain limitations a taxpayer was entitled to deduct the full amount of his losses from transactions in securities. Revenue Act of 1928, § § 23(e), 23(g), 101(b), 113. But the growing custom of diminishing ordinary income by deducting losses realized on the sale of securities which had shrunk in value, due no doubt to the fall in prices after 1929, led Congress to provide in Section 23(r)(1) that deductions for such losses should be limited to gains from similar transactions.
>
> That this was the purpose and the only purpose of Section 23(r)(1) abundantly appears from the Report of the Senate Finance Committee accompanying the bill. Nowhere does there appear any intention to deny to a taxpayer who chooses to execute part of his security transactions in partnership with another the right to deductions which plainly would be available to him if he had executed all of them singly. Nowhere is there any suggestion that Congress intended to tax noncapital security gains until they exceeded similar losses. The language of Section 23(r)(1) does not require such a construction. Nor do the available evidences of Congressional intent indicate such a purpose.

The opinion also discusses and rejects a contention of the Commissioner that the deduction here claimed is inconsistent with the general scheme created for reporting partnership income as well as, in effect, a double use of Section 23(r)(1). With reference to this argument, the opinion adds:

> It is not to be doubted that in the enactment of Section 23(r)(1) Congress intended not only to deal with individual security gains and losses, but also to permit losses suffered in partnership security transactions to be applied against partnership gains in like transactions. It does not follow, however, and the language of the statute does not provide, either expressly or by necessary implication, that losses sustained in an individual capacity may not be set off against gains from identical though distinct partnership dealings. If the individual losses are actually incurred in similar transactions it cannot justly be said that the same deduction is taken a second time, or that the real purpose of the statute, which is ultimately to tax the net income of the individual partner, would thereby be impaired.
>
> Sections 181-189 of the Revenue Act of 1932, 49 Stat. 169, 222-223, provide generally for computation and reporting of partnership income. In requiring a partnership informational return although only individual partners pay any tax, Congress recognized the partnership both as a business unit and as an association of individuals. This weakens rather than strengthens respondent's argument that the privileges are distinct or that the unit characteristics of the partnership must be emphasized. . . . Nor is the deduction claimed here precluded because Congress, in Sections 184-188, has particularized instances where partnership income retains its identity in the individual partner's return. The maxim "expressio unius est exclusio alterius" is an aid to construction not a rule of law. It can never override clear and contrary evidences of Congressional intent.

MR. JUSTICE ROBERTS, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS voted for affirmance of the judgment of the court below.

The case was argued by Mr. J. Louis Monarch for the petitioner, and by Mr. Wilbur H. Friedman for the respondent.

National Labor Relations Act—Power of Board to Select Appropriate Bargaining Unit

When the record in an Unfair Labor Practice proceeding under the National Labor Relations Act, involving a controversy between two competing unions in the employers plant, contains substantial evidence that the employer had by unfair practices given assistance to one union thus effectuating a closed shop contract with the former, which when the contract was executed did not represent an uncoerced majority of the employees, an order abrogating the contract with the union thus assisted, and directing the employer to deal with the other union as the exclusive bargaining agent, is within the authority of the board, even though, before the order was issued, the disestablished union has claimed that it had then been designated by a majority of all the employees.

International Association of Machinists; Tool and Die Makers Lodge No. 35, etc., Petitioners v. National Labor Relations Board. No. 16, 85 Adv. Op. 5, Sup. Ct. Rep. —. Decided Nov. 12, 1940.)

The National Labor Relations Board, in proceedings under Sec. 10 of the National Labor Relations Act, had ordered the Serrick Corporation to cease and desist from giving effect to a closed shop contract with the International Association of Machinists, an A. F. of L. craft union, and to deal with the United Automobile Workers of America, a C. I. O. industrial union, as exclusive bargaining agent of its employees. The employer had complied with this order, but the craft union, as intervenor before the Board, sought review by the Circuit Court of Appeals, which affirmed the Board's order. The Supreme Court had granted certiorari because of the importance of the question and of a conflict of circuit court decisions.

The ground of attack upon the order of the Board was twofold: (1) That upon the record, the Board was without authority to find, as it did, that the closed shop contract was invalid under the Act because the craft union had been assisted by unfair labor practices of the employer since it did not represent an uncoerced majority of the employees at the time of the contract's execution and was not an appropriate bargaining unit; (2) That, because before the Board's action was issued, the craft union had submitted to the Board a claim that it had then obtained the support of an overwhelming majority of all the employees, and the Board had not then ordered an election or even made an investigation to determine the truth of that fact, the Board was without authority to require the employer to bargain with the industrial unit.

The opinion of the Court by MR. JUSTICE DOUGLAS sustains the Board's authority and its order on both points. On the first ground of attack, it reviews the record in some detail. Four old and trusted employees had, prior to the contest between the two unions, been actively engaged in behalf of a company union. Efforts to build up that union having failed, they had shifted their support to the craft union and moved to the forefront of its drive for membership. Their various activities in this drive were carried on in company time and openly in the shop, with the knowledge of plant officials. Similar freedom was not allowed to solicitors of the industrial union. Other facts from the record are summarized in the opinion as follows:

> Five U.A.W. officials had been discharged in June, 1937, because of their union activities. The known antagonism of the employer to U.A.W. before petitioner's drive for membership started made it patent that the employees were not free to choose U.A.W. as their bargaining representative. Petitioner started its drive for membership late in July, 1937, and its closed-shop contract was signed August 11, 1937. On August 10, 1937, the U.A.W., having a clear majority of all the employees, presented to the employer a proposed written contract for collective bargaining. This was refused. On August 13, 1937, all toolroom employees who refused membership in petitioner, some 20 in number; were discharged. On August 15, 1937, the management circulated among the employees a statement which, as found by the Board, was a thinly veiled attack on the U.A.W. and a firm declaration that the employer would not enter into any agreement with it.

The craft union had urged that the hostility of the employer to the industrial union could not be translated into assistance to the opposing faction, and that none of the acts of employees in soliciting for the craft union were attributable to the employer. As to this, the opinion states:

> We disagree with that view. . . . Known hostility to one union and clear discrimination against it may indeed make seemingly trivial intimations of preference for another union powerful assistance for it. Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure. The freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former than campaign utterances.
>
> To be sure, it does not appear that the employer instigated the introduction of petitioner into the plant. But the Board was wholly justified in finding that the employer "assisted" it in its organizational drive. Silent approval of or acquiescence in that drive for membership and close surveillance of the competitor; the intimations of the employer's choice made by superiors; the fact that the employee-solicitors had been closely identified with the company union until their quick shift to petitioner; the rank and position of those employee-solicitors; the ready acceptance of petitioner's contract and the contemporaneous rejection of the contract tendered by U.A.W.; the employer's known prejudice against the U.A.W. were all proper elements for it to take into consideration in weighing the evidence and drawing its inferences. To say that the Board must disregard what preceded and what followed the membership drive would be to require it to shut its eyes to potent imponderables permeating this entire record. The detection and appraisal of such imponderables are indeed one of the essential functions of an expert administrative agency.

The craft union also urged that the Board's conclusion that the membership drive was headed by "supervisory employees" was erroneous, since these particular employees were not foremen but were merely "head men," and therefore their acts are not attributable to the employer. As to this, the opinion says:

> The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*. We are dealing here not with private rights (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible. Thus where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates. Here there was ample evidence to support that inference.

In closing this discussion of this first branch of the case, the Court concludes:

> By Sec. 8(3) of the Act discrimination upon the basis of union membership constitutes an unfair labor practice unless made because of a valid closed-shop contract. But that section authorizes an order under Sec. 10 abrogating such a contract with a labor organization which has been assisted by unfair labor practices. The presence of such practices in this case justified the Board's conclusion that petitioner did not represent an uncoerced majority of the toolroom employees. Secs. 7, 8(1). This conclusion makes it unnecessary to pass upon the scope of the Board's power to determine the appropriate bargaining unit under Sec. 9(b).

On the second ground of objection to the order of the Board, that before an order had been issued, the craft union had notified the Board that it had obtained support of a majority of the employees, and an election or investigation should then have been made, the opinion states:

> We agree with the court below that the Board in failing to act on this request did not commit error. This was not a certification proceeding under Sec. 9(c); it was an unfair labor practice proceeding under Sec. 10. Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority, the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. That necessarily involves an exercise of discretion on the part of the Board—discretion involving an expert judgment as to ways and means of protecting the freedom of choice guaranteed to the employees by the Act. It is for the Board not the courts to determine how the effect of prior

unfair labor practices may be expunged. . . . It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. . . . Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates. Hence the failure of the Board to recognize petitioner's notice of change was wholly proper. . . .

Sec. 9 of the Act provides adequate machinery for determining in certification proceedings questions of representation after unfair labor practices have been removed as obstacles to the employees' full freedom of choice.

The case was argued on October 24, 1940, by Mr. Joseph A. Padway for the petitioner and by Mr. Robert B. Watts for the respondent.

Taxation—Puerto Rican Sales Tax—Foreign and Domestic Commerce Tariff and Customs

A Puerto Rican sales tax imposed by territorial law is not invalid as an infringement of Congressional regulations of foreign and domestic commerce affected by United States tariff laws and customs regulations, when it is applied to the delivery, in consummation of sales, of fuel oil previously imported in bond, and later withdrawn, duty free, for delivery to vessels in Puerto Rican ports for use as fuel upon their voyages to ports in the United States or foreign countries.

West India Oil Company (Puerto Rico) v. Manuel V. Domenech, Treasurer of Puerto Rico. 85 Adv. Op. 37, — Sup. Ct. Rep. —. (No. 26, Decided Nov. 12, 1940.)

Certiorari had been granted in this case to review the judgment of the Supreme Court of Puerto Rico, affirmed by the Circuit Court, that the Puerto Rican sales tax imposed by Sec. 16(a), 62 of the local Internal Revenue Act was valid, when it was laid upon oil brought to Puerto Rico from a foreign country where it had been produced and refined; there stored in bonded warehouses in the joint custody of the objecting taxpayer and the United States under authority of the Tariff Act of 1930; then, from time to time in part withdrawn from bond for delivery to vessels in Puerto Rican ports upon sales for use as ships' stores later to be used as fuel on voyages of those vessels to the United States and foreign countries.

The opinion of the Court was delivered by MR. JUSTICE STONE. It had been urged that the Puerto Rican tax was invalid as here applied because provisions of the Tariff Act of 1930, and the Revenue Act of 1932, and customs regulations relating to bonded manufacturing warehouses, when applied to the transactions that were here under consideration, manifested an intention of Congress to regulate the commerce involved and the local tax on the sale was in conflict with those regulations. In support of this contention, the decision in *McGoldrick v. Gulf Oil Co.*, 309 U. S. 414, which held that the New York City sales tax, when applied to similar transactions in crude oil imported into New York City, was invalid for that reason. The opinion rejects this argument on the ground that in the instant case Congress has consented to the tax by its enactment in 1927 of an amendment to the Organic Act of Puerto Rico:

> Before the amendment, Sec. 3 had prohibited duties "on exports from Puerto Rico," but had provided that "taxes and assessments on property, internal revenue" etc., "may be imposed for the purposes of the insular and municipal governments respectively, as may be provided and defined by the Legislature of Puerto Rico. . . ." Congress, by the amendment, added to Sec. 3 a proviso "that the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax as soon as the same are manufactured, sold, used or brought into the island: *Provided* that no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes.
>
> The plain purport of the words of this proviso is that any tax authorized by the Organic Act with respect to articles of domestic production may likewise be levied with respect to imported articles "as soon as . . .[they] . . . are manufactured, sold, used or brought into the island" provided only that there be no tax discrimination between articles brought from the United States and foreign countries and domestic articles. The amendment seems to have been occasioned by doubts which had arisen whether merchandise brought to the Island from the United States was subject to local taxation while in the original package and also whether the merchandise has, while in the control of the customs authorities, the same status as respects local taxation as goods similarly controlled which have been imported from foreign countries and whether the power of the insular legislature to tax imports from foreign countries was any greater than that of the states which are forbidden, by Clause 2, of Sec. 10 of Art. I of the Constitution, to tax imports and exports without the consent of Congress. . . . The effect of the broad language of the amendment was not only to subject to taxation all imported goods, whether from the United States or foreign countries, when brought into the Island in the original package, but to neutralize the regulatory effect of the customs laws and regulations in so far as they protected articles from local taxation after their arrival. Merchandise in the original package was thus subjected to tax when brought into the Island without regard to customs regulations. It would seem plain that other merchandise not in the original package was left in no more favorable situation and in the face of the broad and unambiguous language of the statute we cannot say that the one, more than the other, is immune from local taxation. Even if the oil sold as ships' stores were to be regarded as "exported," *cf. Swan & Finch* v. *United States*, 190 U. S. 143, 145; *United States* v. *Chaves*, 228 U. S. 525; *Cunard S.S. Co.* v. *Mellon*, 262 U. S. 100, the tax is one clearly within the terms of the proviso added to Sec. 3 and so is one consented to by the United States.

The opinion concludes by pointing out that the procedure for segregating imports in bond without payment of customs and pending withdrawal and re-export, long antedated the amendment of the Organic Act. Thus the later acts of 1930, and 1932, placed fuel oil in Puerto Rico in the same category as original package or bonded merchandise which was subject to local taxation when it was brought into the Island.

> The extension by Congress to fuel oil of the benefits of the customs laws and regulations affecting merchandise imported in bond did not imply that those laws and regulations were to be given any different effect in Puerto Rico than they then were permitted to have under Sec. 3 of the Organic Act. In any event, considering the relationship of general Congressional legislation to legislation specifically applicable to our territories and possessions, repeals by implication are not to be favored and will not be adjudged unless the legislative intention to repeal is clear.

MR. JUSTICE REED delivered a dissenting opinion, in which he was joined by MR. JUSTICE ROBERTS. The reasoning upon which the dissent is predicated is stated in its first paragraph as follows:

> This judgment should be reversed on the authority of *McGoldrick* v. *Gulf Oil Corporation*, 309 U. S. 414. That case has just established the superiority of a federal statute for the protection of commerce over a state's right to levy a sales tax. In it we pointed out that it was inconsistent with the plenary power of Congress over commerce to permit local exactions to cut into the competitive advantages provided through the remission of customs duties to suppliers and exporters by the ship stores and fuel oil provisions of Sec. 309 of the Tariff Act of 1930 and Sec. 601(b) and Sec. 630 of the Revenue Act of 1932. Congress authorized these advantages to give our ship chandlers opportunity to compete for this trade on an even basis with nonresidents. The *Gulf Oil* case held that imported fuel oil carried in New York bonded warehouses for export might be sold, under Treasury oversight, to noncoastwise shipping without payment of the city sales tax. The opinion demonstrated that the purpose of Congress would be thwarted if local taxation were permitted to interfere. The same holding in my opinion is required here.

The dissent states disagreement with the majority as to the effect of the 1927 amendment to the Puerto Rican Organic Act, expressing the view that that amendment merely makes goods in the original package in Puerto Rico taxable as other goods in the common mass of taxable property, and gives no broader power of taxation of oil sales to Puerto Rico than is possessed by New York or other states under the decision in the *Gulf Oil case, supra.*

The case was argued on October 23rd and 24th by Mr. James R. Beverley for the petitioner and by Mr. William Cattron Rigby for the respondent.

Summaries

Statutes—Miller Act—What Constitutes Service of Notice

Fleisher Engineering & Construction Co., and Joseph A. Bass, doing business as Joseph A. Bass Co., et al. v. U. S. of America, for the use and benefit of George S. Hallenbeck, etc. 85 Adv. Op. 32, —Sup. Ct. Rep.—. (No. 15, decided November 12, 1940.)

Certiorari to determine whether in a suit by one who has furnished labor for a subcontractor on a housing project erected under contract with the United States, for recovery upon a payment bond given by the contractor, the service of notice upon the contractor, as required by Sec. 2 of the Miller Act, was sufficient since it was not sent by registered mail, although it was actually received and its contents were adequate.

The Court's opinion by MR. CHIEF JUSTICE HUGHES holds that the statutory requirement had been satisfied. It points out that the Miller Act was intended to be highly remedial and, therefore, should be liberally construed. It finds that although the statute specifies that service shall be by registered mail, the purpose of that requirement was merely to assure receipt of notice, and was not intended to deny right of suit even though required notice within the specified time had been given and received. In this sense the provision of the statute dealing with the method of service was construed to be intended to provide a means to get proof of service when receipt of the notice is not shown, rather than to be a condition precedent to the right to sue.

The case was argued on October 17 and 18, 1940, by Mr. Frank Gibbons for petitioners and by Mr. Edwin J. Culligan for respondent.

Taxation—Privilege Taxes

Continental Assurance Company v. Tennessee. 85 Adv. Op. 42; 61 Sup. Ct. Rep. 1 (No. 117, Opinion filed Oct. 21, 1940.)

Tennessee sued to enforce payment of taxes on privilege of doing business within the state, measured by a percentage of annual premiums to be paid through the life of the policy. The company withdrew from the state and claimed that it had neither transacted business nor received premiums in the state thereafter. The Supreme Court of Tennessee sustained the tax. The company appealed to the Supreme Court of the United States, relying on a former decision in what was claimed to be a similar case. (*Provident S. & L. A. S. v. Kentucky*, 239 U. S. 103). The Tennessee court had distinguished that case because here the tax was levied on the privilege to enter the state and engage in the insurance business and was measured by the premiums for the life of the policies respectively, and was therefore not terminated by withdrawal from the state, whereas the tax in the earlier case cited was levied on the premiums received.

The appeal was dismissed for want of a substantial Federal question.

Taxation—Processing Taxes—Refunds

Wilson & Co. v. United States (and consolidated cases) — Adv. Op. —; — Sup. Ct. Rep. — (Nos. 23, 24 and 25. Opinion filed Nov. 18, 1940).

Petitioners who are engaged in the preparation, packing and sale of meat products in foreign and domestic commerce, filed claims for refunds of processing taxes paid by them under the Agricultural Adjustment Act. The Commissioner of Internal Revenue denied all the claims and suit was brought in the Court of Claims. The United States sought to remove the petitions for lack of jurisdiction because of the provisions of Title VII of the Revenue Act of 1936. The Court of Claims dismissed the actions for want of jurisdiction on the ground that Section 601 (e) of the act referred to prevented judicial review of the Commissioner's action. Certiorari was granted to resolve the conflict with the decisions of other circuits involving the same question. In an opinion by MR. JUSTICE MURPHY the court held that the Court of Claims was without jurisdiction.

Mr. Dean G. Acheson argued the case for the petitioners and Mr. Warren W. Gardner for the respondent.

(After the foregoing reviews and summaries were set up and ready for the press, the Supreme Court handed down five additional opinions which are here very briefly summarized.)

Bankruptcy—Municipal Corporations

American United Mutual Life Insurance Company v. City of Avon Park, Fla. No. 31. (Opinion filed November 25, 1940.)

The district court confirmed a plan for the composition of debts of a municipality under Chapter IX of the Bankruptcy Act. The Circuit Court of Appeals affirmed. The Supreme Court reversed on the ground that creditors of the municipality were not fully informed of the relations between the municipality and its corporate fiscal agent. That agency owned a consid-

erable portion of the requisite two-thirds of the municipal bonds, obligations and indebtedness, and the record did not show that those relations were communicated to the other creditors. On this question the Court, speaking by MR. JUSTICE DOUGLAS, said that the fiscal agent was acting in a dual capacity and that the minimum requirement for fair dealing was the elementary obligation of full disclosure of all its interests; that equity and good conscience would not permit a finding that acceptance of the plan by one acting in a representative capacity constitutes "good faith" when the agent is obtaining an undisclosed benefit from the plan. It was suggested that since the case must be remanded the trial court determine whether the claims held by the agency were not owned by or held for the city and whether therefore those claims could be included in the computation of the two-thirds majority of consenting creditors required by the Bankruptcy Act. The district court was also admonished to consider the applicability of recent Florida decisions bearing upon the legality of the fiscal agency contract.

Giles J. Patterson argued the case for the petitioner; Robert J. Pleus for the respondent.

Constitutionality—Equal Protection—Exclusion of Colored Citizens from Jury Service

Smith v. Texas. No. 33. (Opinion filed Nov. 25, 1940.)

The conviction of a negro in a Texas court affirmed by the Texas Court of Appeals was reversed because the evidence showed that there was actual racial discrimination against persons of the colored race in the selection of grand jurors.

Sam W. Davis argued the case for the petitioner; George W. Barcus, Assistant Attorney General of Texas, for the respondent.

Statutes—Federal Communications Act of 1934—Method of Appeal

Federal Communications Commission v. Columbia Broadcasting System of California. Nos. 39, 40. (Opinion filed Nov. 25, 1940.)

Held in an opinion by Mr. Justice Frankfurter that an order of the Communications Commission denying an application of an assignment of a broadcast license was not appealable and could be reviewed only by a suit in a Federal district court.

Telford Taylor argued the case for the Commission; Harry M. Plotkin for the respondent broadcasting companies.

Taxation—Income Tax—Gifts Taxable to Donor

Helvering v. Horst. No. 27. (Opinion filed Nov. 25, 1940.)

The Commissioner of Internal Revenue obtained certiorari to review a decision on the question whether the gift of interest coupons detached from the bonds, delivered to the donee, and later in the year of the gift paid at maturity, is the realization of income taxable to the donor. MR. JUSTICE STONE delivered the opinion of the Court and held that when by the detachment of coupons from a bond and the gift of the coupons, the donor has separated his right to interest payments and procured the payment of that interest to his donee, "he has enjoyed the economic benefits of the income in the same manner and to the same extent as though the transfer were of earnings and in both cases the import of the statute is that the fruit is not to be attributed to a different tree from that on which it grew." The case was reversed. MR. JUSTICE MCREYNOLDS filed a separate opinion in which he dissented from the opinion of the majority on the ground that the unmatured coupons were independent negotiable instruments complete in themselves and that through the gift they became at once "the absolute property of the donee free from the donor's control and in no way dependent upon ownership of the bonds."

The CHIEF JUSTICE and MR. JUSTICE ROBERTS concurred in the dissenting opinion.

Arnold Raum argued the case for the Commissioner; Selden Bacon for the taxpayer.

Another case, *Helvering v. Gerald A. Eubank,* No. 205, was a companion case similarly decided with similar dissent.

The Law List Problem

ONE of the interesting reports submitted at the Philadelphia meeting was that of the Special Committee on Law Lists. The full report will appear in the Annual Report of the Association. Some excerpts from it and comment will be of interest here. In describing the "Background of the Law List Problem," the report says:

> Law lists began to develop about 65 years ago. Their number grew rapidly. They developed without any regulation, restraint or control of any kind from any source. During the past ten years approximately 300 lists, directories, rosters and the like have been issued in this country alone. All have been dependent upon the profession for support and existence. They have cost the members of the profession millions of dollars. Some have been prepared, issued and conducted so as to merit support. Most of the 300 were not. Many of them were little more than rackets. They produced practically nothing for their listees and the practices engaged in by their issuers were not designed to inspire confidence.

The Special Committee was created in 1937. One of its major tasks has been the examination into the records of the various publishers and the determination of an approved law list. The complete 1940 list down to date appears on page 845 of the November issue of the JOURNAL.

In commenting on General Progress, the committee says:

> Publishers report to the committee that they find conditions affecting law lists, generally speaking, very much more ethical and that the vicious abuses, formerly accepted almost universally as a necessary evil, have been largely eliminated. . . . The publishers have been educated to conduct their affairs on a much higher plane. They are sincerely striving to cooperate with the committee to elevate their business.

The publishers thoroughly approve and support the present setup. What has been accomplished in the past three years, in their judgment, has been more economically and effectively done by the Association and its Committee than would otherwise have been possible.

The committee points out that one of the most vitally effective groups is comprised of the business houses which use the law lists for forwarding business to attorneys. The committee has consulted with representatives of this group and has received cooperation from it. The committee made no request for action other than that it was necessary for the committee to continue its work for a further time.

London Letter

THE HONOURABLE SOCIETY OF THE MIDDLE TEMPLE

October 10th, 1940.

Dear Mr. Lavery,

Thank you very much for your kind letter of September 17th, and please forgive the delay in answering it. You will appreciate by the contents of the "London Letter" for your December number which I forward herewith, that we have had a fairly hectic time here, and I fear it has interrupted my correspondence a little as I have sundry ARP duties to perform in addition to my usual job of work. The absence of my assistant does not improve matters.

I look forward to seeing the October issue of the Journal and, with regard to your very kind offer of spare copies, should like to express my appreciation. May I have half a dozen copies? I purposely keep my request moderate as the Import of Goods (Prohibition) (Consolidation) Order, 1939 forbids the import of "Books and other printed matter for reading purposes. . . . other than those imported in single copies through the post." It would, therefore, be necessary for you to send even six copies in separate postal packets, and I do not wish to put you to any expense which can be avoided.

I am happy to say that, in spite of these trying times, most of us keep smiling. Those who have lost friends and relatives in the bombings can hardly be expected to smile yet, but if they lack the power, temporarily, to smile, their resolution to see the thing through is tremendously increased. No one even thinks of stopping till Hitler and all that he stands for, is smashed.

With warmest regards and best wishes,

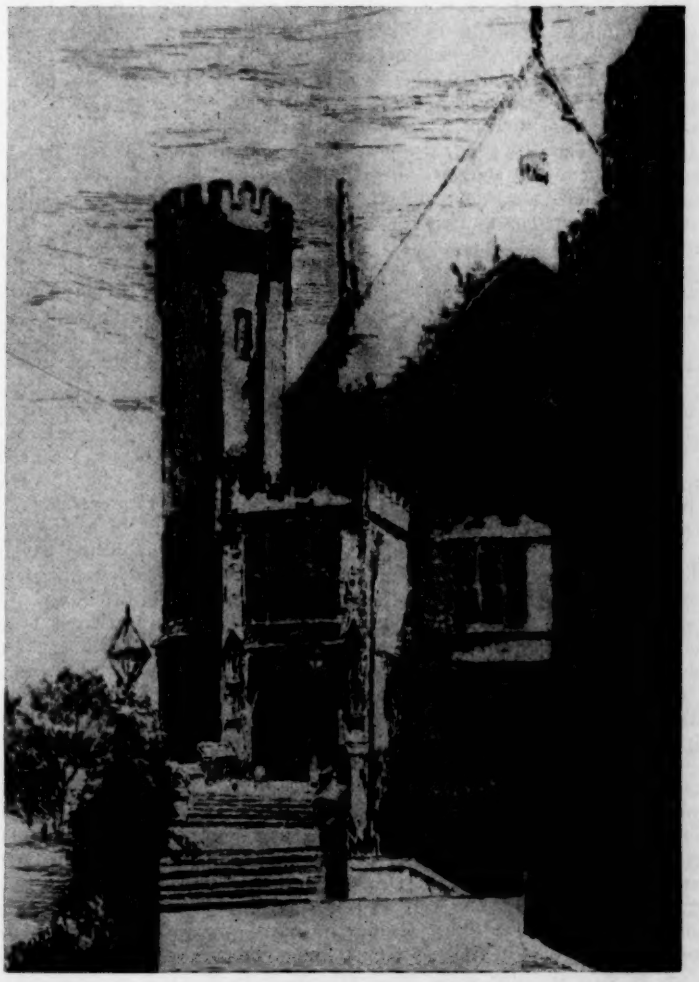
Sincerely yours,

H. A. C. STURGESS,
Librarian and Keeper of the Records.

London, *October 10, 1940*

AT the time of writing, the war seems to be occupying the greater part of one's thoughts, and more particularly is this the case among the legal profession, since the Bar and the Inns of Court have received their due share, or perhaps more than their due share, of the result of Nazi hatred, as exemplified by the random bombing of non-military objects in London. Incidentally, it may be said that what the enemy hopes to gain by it is beyond the comprehension of anyone in this country.

The first bit of frightfulness experienced by the Inns of Court was a high-explosive bomb in the garden of Gray's Inn, which did no more damage than the shattering of windows in chambers around the garden and the making of a large crater in the lawn. Later the Inner Temple Library was hit and the clock-tower, which contained the staircase leading to the Library, was almost entirely demolished. The staircase itself had completely disappeared and the clock, one face of which was still visible, registered the time of the event as ten minutes to four. Much of what remained of the tower has been taken down as a measure of precaution against further damage. This clock-tower was erected after an ancient tower "built of chalk, rubble, and ragstone, surmounted by a wooden cupola with a bell" had been pulled down in 1866. A few books could be seen, after the explosion, lodged precariously on twisted girders high in the tower, and others were found in the ruins below, but it is gratifying to know that little damage has been done to the contents of the Library, although two other rooms suffered as a result of flying glass and rubble.



Library, Inner Temple.

It might have been thought that, by the law of averages, the Inner Temple would escape further damage, but a few nights later the Temple as a whole received another visit—this time, unfortunately, attended with more serious results. The beautiful Inner Temple Hall, in which so many members of the American Bar were entertained on the memorable occasion of their visit to this country in 1924, suffered a direct hit by a high-explosive bomb. The walls of the building still stand, but much damage has been done to the roof and to the interior. Not a piece of the beautiful heraldic glass remains in the windows, and many of the pictures have suffered. It will

be some time before the Hall can be used again, but, according to present accounts it will be possible to repair it. The Master Treasurer of the Middle Temple (Sir Cecil Hurst, G.C.M.G., K.C.B., K.C.) immediately offered the hospitality of the Middle Temple Hall and Library to members of the Inner Temple. Lunches are still served in the Middle Temple Hall and members of the Inner Temple have taken advantage of the offer and have expressed their appreciation of the welcome which has been accorded to them.

A building in Crown Office Row was also hit and, although it looks somewhat bent, it is still standing. There is a large crater at the entrance. Another bomb came down in the Inner Temple Garden, but no damage was done by this one. In the Middle Temple a building in Elm Court, in which the Society of Comparative Legislation is housed, was completely demolished, but the Society itself may be said to have had exceptional good luck. Many of their possessions were destroyed, but the whole of the material for the next number of their Journal was undisturbed, though very dusty, and the issue will appear on time. Even the paying-in book, containing cheques ready for paying into the bank, as well as the petty cash, was found to be intact. The Society is now functioning from a temporary address in the Temple and steps are being taken to find for it another permanent home. Other tenants and residents in the building were not so fortunate, but it is believed that it will be possible to salve many of their possessions.

Essex Court was another part of the Middle Temple which came in for unwelcome attention, but buildings were missed and the bomb fell in the open Court. The effect of the blast from this bomb was curious. Windows of some of the chambers were shattered, while others, nearer to the actual explosion, were not even cracked. A large piece of paving stone was hurled through the window of one room, smashing a small glass vase, but doing no other damage. In yet another building a high-explosive bomb crashed through the roof and went through all floors into the cellar below, but failed to explode and was later removed by the Inn's staff without incident.

It is a remarkable fact that, in spite of all this excitement in the Temple, not anyone received so much as a scratch from enemy action (although one resident received first aid for a cut sustained by his falling over an obstruction in the dark) and this in spite of the fact that one of the bombs landed at the entrance to a shelter which was fully occupied at the time. The occupants made their way through various emergency exits to other shelters and resumed their interrupted sleep. It may be remembered that I commented on the shelters provided in the Temple some time ago and it is gratifying to know by experience that their sites were very wisely chosen. Perhaps the most remarkable escape, however, fell to the lot of two members of the Middle Temple staff, who were doing duty as "spotters" for incendiary bombs on the roof of a building next to the one demolished in Elm Court. They were unharmed. The Middle Temple authorities have been able to provide alternative accommodation for all tenants and residents who have been rendered temporarily homeless, and life is again proceeding more or less smoothly.

Although, as stated, damage has been done to several places in the Temple, that done to the Inner House is, of course, the most regrettable. It is not an ancient building, having been erected in 1870, and opened by Princess Louise on behalf of Queen Victoria on the 14th May in that year. It was built from designs of Sir Sydney Smirke, partly on the foundations of the old Hall, which is believed to have dated back to the time of the Knights Templars. The interior of the Hall is much larger than its external appearance would lead one to suppose. It is 94 feet in length, 41 feet in width and 40 feet high to the springing of the hammer beams supporting the roof. The Middle Temple Hall, one of the finest specimens of Elizabethan architecture in the country, has, so far, suffered no more serious damage than the breaking of a few windows by the force of the blast from the explosion in Elm Court. Fortunately, the Benchers of that Inn had taken the precaution, in the early days of the war, of having the stained glass removed from the windows and plain glass put in its place. They have also removed the valuable pictures which adorned the walls.

Lincoln's Inn has, fortunately, not suffered any damage except for a few broken windows, caused by the blast from a bomb which wrecked a nearby building. A member of Lincoln's Inn who has chambers in Stone Buildings found, stuck into the wall of his room, a pair of scissors which had evidently been blown from the said building through his window.

The Royal Courts of Justice have also suffered damage in recent raids. One of the Chancery Courts was demolished when a high-explosive bomb crashed into the west wall of the main building. Two other Chancery Courts—the Lord Chancellor's Court and another—were also badly damaged, but it is believed that it will be possible to repair them. Windows were shattered in all the Courts in the West Gallery, and some of the valuable stained glass in the Great Hall was smashed. It is perhaps worthy of comment that scores of German judges and lawyers have in the past received much valuable assistance from the Inns of Court Libraries when visiting this country for the purpose of legal research. This courtesy was being shown to some almost up to the day upon which war was declared, and it cannot be claimed that their air force has made a generous repayment for value received. However, if any return after the war, they will miss one staircase up which they once wended their way in the hope of improving their minds.

While the above was being written another bomb came down in the Inner Temple garden. Practically every window in King's Bench Walk, Crown Office Row, Paper Buildings and Harcourt Buildings overlooking the garden was smashed, but there were no casualties.

Evidence and Powers of Attorney Act

Among the numerous Acts passed in England as a result of the War, mention may be made of the Evidence and Powers of Attorney Act, which has recently received the Royal Assent. On moving the second reading of the Bill in the House of Commons on the 4th of June, Sir Donald Somervell (the Attorney General) pointed out that it dealt with three or four different matters. The procedure in ordinary peace time for enabling British subjects, or other persons, who have business here to swear affidavits abroad which would be accepted in this country was, he said, quite inadequate in war-time when there are so many of our fellow citizens serving overseas. The Act therefore provides, in Section 1, that the Lord Chancellor may by order provide for empowering officers of the fighting forces to administer oaths and take affidavits during any war in which His Majesty is engaged for all or any purposes for which an oath may be administered or affidavit taken by a commissioner for oaths appointed under Section 1 of the Commissioners for Oaths Act, 1889. An example of an occasion upon which someone serving abroad may wish to take advantage of this provision is where a man might be concerned in winding-up an estate. The section also deals with those who might be in enemy territory or enemy occupied territory, and enables the Secretary of State to empower persons serving in the Diplomatic, Consular or other foreign service which has undertaken to represent His Majesty to administer oaths or take affidavits. Clause 2 deals with quite a different matter. Letters inter-

cepted by the Censorship Department might quite conceivably contain material evidence in criminal cases and, in the ordinary course of procedure, it would be necessary for their officials to attend the trial, and probably the committal proceedings as well, to give merely formal evidence to the effect that these were the documents which had been intercepted. It was realised that much valuable time might be wasted in this way and that, if the official who was involved had subsequently been sent overseas, it might be virtually impossible to secure his attendance. Power is therefore given to a competent officer to certify that a particular document or photographic copy of a document has been intercepted, and such certificate will be accepted as evidence in the ordinary Courts. Section 3 of the Act deals with powers of attorney. It is realised that, with many men serving overseas, the need for executing such powers will increase, and additional safeguards are provided to prevent the fabrication of powers of attorney for those who have gone abroad and cannot, in consequence, look after their own affairs. It is therefore enacted that no instrument creating a power of attorney, to which the Act applies, shall be of any effect unless it is attested by at least one witness and unless and until it has been deposited in the central office of the Supreme Court; or has been registered in Scotland in the books of council of session; or has been deposited in the proper office of the Supreme Court under section forty-eight of the Conveyancing Act, 1881, as it applies to Northern Ireland. Section 4, as stated by the Attorney General, deals with a technical defect in the law. Formerly office copies of these documents filed in this country or in Northern Ireland were accepted at Courts in England or in northern Ireland but not in Scotland. As the object of the Act is that these documents can be filed in any of the three countries the section puts the law on a uniform basis and enables office copies, or the equivalent, to be accepted in the courts of all the three countries wherever the original may have been filed.

Judicial Changes

Lord Hewart, on whom a viscounty is to be conferred, has resigned the post of Lord Chief Justice, with effect from October 12th. His retirement was not altogether unexpected, as it was known that his health had not been good for some time. He is seventy years old, having been born in January 1870, and was called to the Bar at the Inner Temple in 1902. He took silk in 1912; was elected a Bencher of his Inn in 1917, and became Treasurer in 1938. He was Solicitor General from 1916 to 1919 and Attorney General from 1919 to 1922. In the latter capacity he attended the Peace Conference in Paris in 1919. It will, no doubt, be remembered in the United States that he was a guest of the American Bar Association on the occasion of his visit in 1927, when he was welcomed in a speech by the Hon. William Howard Taft, who was then Chief Justice of the United States. The meeting of the Chief Justices of the two great English speaking nations, together with their respective speeches, was recorded in this JOURNAL at the time, and it is interesting to recall that Lord Hewart referred to the ideals common to both nations, which became so obvious in the last war. It is also worthy of note that the former President and Chief Justice of the United State was elected an Honorary Bencher of the Middle Temple in 1922.

Lord Caldecote has been appointed to succeed Lord Hewart as Lord Chief Justice. This is the first time in history that one who has occupied the highest judicial office in the country has afterwards filled an office which takes third place in the table of legal precedence. Lord Caldecote was appointed Lord Chancellor last year. He was called to the Bar at the Inner Temple in 1899 and later became a Bencher of that Inn. As Sir Thomas Inskip he was Solicitor General from November 1922 to January 1924, from November 1924 to March 1928, and again from 1931 to 1932; Attorney General, 1928-29 and 1932 to 1936. His total term of office as a Law Officer of the Crown is believed to be the longest for four hundred years. His appointment to the Chief Justiceship has been warmly welcomed by the Bar.

In Lighter Vein

Pheasant is by no means an unknown dish in the Middle Temple Hall, but it must be a very long time since one of the species was seen alive in the Middle Temple Garden, if indeed, there is a precedent for it; but during an air-raid warning on a day in October a very fine specimen was seen strutting proudly across the lawn towards the vegetables now growing there. He had probably been scared out of his country home by the unusual loud noises of the past few weeks. It is sad to relate that he was not long allowed to enjoy the "peace" of the Temple. The black cat belonging to the Inn took exception to his intrusion and he was again forced to seek "fresh woods and pastures new."

S.

Temple.

Law Lists

The Law List publications which have been approved for the year 1941, by the Special Committee on Law Lists, was printed in the November Journal, page 845. We note with satisfaction the wide interest in the approved Law List. For example the List has been reprinted in the November issue of the Los Angeles Bar Association Bulletin. The Committee on Law Lists has since announced the approval of another publication, CAMPBELL'S LIST, 1941-42 EDITION.

Comment on the annual report of the Committee on Law Lists will be found in this issue, page 934. In that connection the following comment will be read with interest:

Free Advice

(*From the October Journal of the Bar Association of Kansas*)

It's your money. You may throw it away if you like. But if your fees are as illusive as ours, you should be interested in this. It is a paradox that lawyers whose yield is small spend thousands of dollars in hard earned fees subscribing to non-existent or barely (circulation: 100—perhaps!) existent "legal directories" in the vain hopes of increasing their future crop. Directory dupery is a thriving industry. It will continue to thrive unless and until lawyers are afforded a means of ascertaining the merit of the salesman's directory before they subscribe. And that's where we come in.

Your editors are in receipt of a list of the legal directories whose 1941 editions have received the approval of the American Bar Association's Special Committee on Law Lists. This list has been compiled after thorough investigation and at considerable expense. It is compiled by lawyers purely for the benefit of lawyers. We publish it herewith. The next time a directory salesman gives you the sales talk, the subscription contract, and the fountain pen, check his product against this list. If his directory is not among those appearing in the following list . . well . . . it's your money and you may throw it away if you like.

Connecticut Bar Journal

The JOURNAL editorial office is in receipt of the CONNECTICUT BAR JOURNAL for October, 1940. It contains 6 original articles including one on "THE JUDICIAL COUNCIL OF CONNECTICUT, 1927-1940," by Richard H. Phillips, Secretary and member of the Council since its organization. This article will be read with interest by that growing number of lawyers and students of Jurisprudence, who are interested in the rather new idea of Judical Councils.

NATIONALITY ACT OF 1940

By George S. Knight
Assistant to the Legal Adviser, Department of State

Historical Background

THE enactment of the Nationality Act of 1940, which was approved and became a law on October 14, 1940,[1] represents the first attempt ever made since the founding of our Republic to codify and unify all the laws of the United States relating to the important subjects of nationality and naturalization. The need for revising and codifying our nationality laws, which is of especial importance at this particular time, has for many years held the attention of high government officials.

As early as 1923, Mr. Alvey A. Adee, Second Assistant Secretary of State, in a memorandum addressed to the then Secretary of State, Mr. Charles Evans Hughes, agreed with a suggestion of Mr. Richard W. Flournoy of the then Solicitor's Office, that our complex nationality laws should be revised, and made the following characteristic statement:

> "I think a commission to *determine* something should be recommended to Congress."

In order to have the proper background not only for recommending appropriate legislation to Congress but also to obtain comments on a pending bill in Congress, the Department of State on December 28, 1927, sent a circular instruction to certain American consular officers in which opinions were requested regarding desirable changes of the existing nationality laws, based upon their experience in dealing with cases arising at various posts where they had been stationed. The information obtained from these sources, upon being summarized in one report, proved of considerable value.

On June 23, 1928, Secretary of State Frank B. Kellogg created by a Departmental Order an Inter-departmental Committee composed of Mr. Richard W. Flournoy, Assistant Solicitor; Mr. Donald Bigelow, Foreign Service Officer; and Mr. John J. Scanlan, Assistant Chief of the Passport Division. This committee, being charged with the duty of drafting a bill which would embody the views of the Department with respect to the codification of our nationality laws, made its report on March 29, 1929. An important provision recommended was that, with certain exceptions, a person who was born with dual nationality would lose his American nationality if, when he attained the age of twenty-three years, he had his principal place of abode in the foreign country of which he was also a national. While the Department of State recommended that such a provision should be included in the Nationality Act of 1940, the Departments of Justice and Labor would not agree that this was desirable. Another important provision recommended by the Inter-departmental Committee was that a naturalized person upon residing for two years in his native country or five years in any other foreign country would, with certain exceptions, cease to be an American national. The latter provision recommended by the Inter-departmental Committee was used as a basis for Sections 404-406 of the recent Act, which provide for a loss of citizenship in the cases of naturalized persons who reside for certain periods in foreign countries.

On April 25, 1933, President Franklin D. Roosevelt designated by Executive Order No. 6115 the Secretary of State, the Attorney General, and the Secretary of Labor as a committee to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to the Congress. In pursuance of this Order, a committee of advisers, composed of six representatives of the Department of State, Wilbur J. Carr, Chairman, Green H. Hackworth, Richard W. Flournoy, Ruth B. Shipley, John J. Scanlan, and Benedict M. English, Secretary; six representatives of the Department of Labor, Daniel W. MacCormack, Charles E. Wyzanski, Jr., Edward J. Shaughnessy, Henry B. Hazard, Thomas N. Eliot and Howard D. Ebey; and one of the Department of Justice, Albert Lévitt, was appointed to study the existing nationality laws, and prepare a draft code containing such changes as seemed desirable, together with a report covering the suggested changes. Due to the complexity of these laws, the wide scope of the field covered by them, and certain obstacles which arose, the report was not completed until August 13, 1935. Among those called upon by the Department of State for suggestions in connection with the preparation of the code were several chiefs of division of the Department of State, certain Passport Agents in New York, Boston, Chicago, and San Francisco, and thirteen of the principal consulates abroad. It may also be mentioned that the appropriate committees of the American Bar Association[2] and the Federal Bar Association rendered valuable assistance in connection with the preparation of material for and the enactment of the Nationality Act of 1940.

On June 13, 1938, the President transmitted to Congress, with a message, the text of, and explanatory comment on, the various provisions of the original draft code which was transmitted by the Secretary of State, the Attorney General and the Secretary of Labor to the President on June 1, 1938.[3]

After occupying the attention of the Committee on Immigration and Naturalization for considerable time, during which extensive hearings were held, the bill was introduced in the House of Representatives by Congressman Dickstein, Chairman of the Committee on Immigration and Naturalization, on September 11, 1940.[4]

1. This Act, Public No. 853, 76th Cong., H. R. 9980, does not take effect until 90 days from the date of its approval.

2. On January 8, 1940 the Section of the American Bar Association on International and Comparative Law adopted the following resolution: "*Resolved*, That the movement to have a thorough revision of the nationality laws of the United States be endorsed and that it be embodied in a single nationality code similar to H. R. 6127 [Later H. R. 9980] introduced May 3, 1939, and entitled "A Bill to Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code." See 64 A.B.A. Rep. 1939, p. 400.

3. See Part 1 of the House Committee print of H. R. 9980, 76th Congress, 1st Session.

4. See Congressional Record, Vol. 86, No. 169 of September 11, 1940, pp. 18085-18106. For the other discussion of the Act in Congress, see Congressional Record, Vol. 86, No. 182 of September 30, 1940, pp. 19344-19345; *idem.*, No. 186 of October 4, 1940, pp. 19889-19890.

The bill finally passed Congress on October 4, 1940.

Substantive Changes

Since it will be impossible in this short discussion to mention all the substantive changes regarding nationality and naturalization embodied in the Nationality Act of 1940, only the most important changes made by the law will be dealt with.

Section 201(e) declares that "A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person" shall have American nationality at birth.

Section 201(g) is much stricter than the old law, i.e. Section 1 of the Act of May 24, 1934 which concerns the citizenship of a child born abroad to parents one of whom was an American citizen and one an alien. The old law did not require any specific period of residence for the citizen parent in the United States as a condition to the acquisition of citizenship by the foreign-born child. Section 201(g) provides that the citizen parent should have "had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years." This provision appears to be especially desirable since it will prevent citizenship of the United States being transferred to a foreign-born child by a parent who, although born in this country, is likely to be attached to a foreign country more closely than the United States. In this connection, it will be observed that in these cases the other parent is an alien. Also, attention is invited to the fact that the provisions of this section apply not only to a male citizen parent and an alien female parent but also to an alien male parent and an American citizen female parent.

Section 203(a) and Section 203(b) serve to clarify the status of persons born in the Canal Zone and the Republic of Panama under certain conditions.

The provisions of "Chapter III—Nationality Through Naturalization," i.e. Sections 301 to and including Section 347, relate to the process of obtaining naturalization in the United States.[5]

In this Chapter there have been retained those established provisions of basic law which have proved to be satisfactory over a long period of years. The racial requirements will permit the naturalization not only of white persons, aliens of African nativity or descent, and Filipinos with three years' honorable service in the armed forces, but descendants of races indigenous to the Western Hemisphere.

In general, the naturalization laws have been improved and strengthened through a more effective procedure. Authority has been given to the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, to prescribe the nature and scope of the educational test for naturalization required of aliens. Naturalization examiners may now be designated by the Commissioner to conduct preliminary hearings and to take testimony and make recommendations to all naturalization courts, both State and Federal, in petitions for naturalization. Heretofore this practice has been applicable to about 250 Federal Courts only and the practice is now being extended to about 1700 State Courts.

5. The writer gratefully acknowledges the aid of Mr. Henry B. Hazard, Director of Research, Information and Education of the Immigration and Naturalization Service, Department of Justice, in connection with the following information regarding Chapter III.

During the World War persons who had rendered military or naval service in various units were granted the privilege of naturalization upon the basis of varied types of proof. The recent Act will make the requirements uniform as to persons serving honorably in the United States Army, Navy, Marine Corps or Coast Guard for a period or periods aggregating three years. Anarchistic and other subversive groups are prohibited naturalization if their objectionable views have been entertained or there has been affiliation with any organization or group of a subversive nature within ten years prior to filing a petition for naturalization.

One of the improvements for which the new Act will be responsible is a greater uniformity in the application and administration of the law.

The following provisions of Section 401 which set out in part the means by which an American national shall lose his nationality are of especial interest:

> "(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> "(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or
>
> "(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or
>
> "(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or
>
> "(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or
>
> "(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction."

Section 402, concerning "a national of the United States who was born in the United States or who was born in any place outside the jurisdiction of the United States of a parent who was born in the United States," was inserted in the Code at the instance of the War Department, while the bill was under consideration by the House Committee on Immigration and Naturalization. It will be observed that this Section provides that, when a person of the class mentioned "shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state," it shall be presumed that he has expatriated himself under Subsection (c) or (d) of Section 401. Subsections (c) and (d) of Section 401 are quoted above.

Subsection (c) of Section 317 provides for expeditious naturalization of persons who lose nationality under Section 401 (c).

Section 403(a) states that "Except as provided in subsections (g) and (h) of Section 401, no national can expatriate himself, or be expatriated, under this Section while within the United States or any of its outlying possessions, . . .," but that expatriation will result from the performance of such acts upon taking up a residence abroad. Section 403(b) provides that "No national under eighteen years of age can expatriate him-

self under subsections (b) to (g), inclusive, of Section 401."

Subsection (a) of Section 404 provides that a naturalized citizen who resides for two years in the territory of a foreign state of which he was formerly a national or in the foreign country of his birth shall lose American nationality "if he acquires through such residence the nationality of such foreign state." Subsections (b) and (c) of Section 404 provide that, with certain exceptions, a naturalized citizen will lose his American nationality if he resides for three years "in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated" or by "residing continuously for five years in any other foreign state." It will be observed that under these provisions nationality of the United States is definitely terminated upon the happening of certain conditions. Under the old law naturalized citizens could reside abroad indefinitely without losing their citizenship. Such persons could also transmit citizenship to children when they themselves were little more than nominally American citizens. Obviously, the provisions of the new law will be advantageous to the United States. Before passing, it might be well to mention that Section 409 provides that nationality shall not be lost under the provisions of Section 404, above mentioned, until the expiration of one year following the date of the approval of this Act.

Section 501 requires diplomatic and consular officers to report to the Department of State, under regulations to be prescribed, the cases of persons who are believed to have lost American nationality under the provisions of the Act.

Section 502 authorizes the Secretary of State, in his discretion, to issue "a certificate of nationality for any person not a naturalized citizen of the United States who presents satisfactory evidence that he is an American national and that such certificate is needed for use in judicial or administrative proceedings of a foreign state."

Section 503 reads:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided."

It is believed that the Nationality Act of 1940 is a well drafted law, which will impose few, if any, real hardships in individual cases arising thereunder. One of the main purposes of this legislation was to remedy loopholes and obvious weaknesses of the old laws. The provisions cited above appear to accomplish this purpose satisfactorily.

There is every reason to conclude that the Nationality Act of 1940 will be of great benefit to the United States in its relations with foreign countries, since it will tend to reduce the number of cases of persons in foreign countries who have only technical claims to American nationality and whose real connections are with the countries in which they reside.

Announcement of 1941 Ross Essay Contest

Conducted by American Bar Association Pursuant to Terms of Bequest of Judge Erskine M. Ross, Deceased

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"Prospective Development of International Law in the Western Hemisphere as Affected by the Monroe Doctrine."

NOTE: It is expected that the discussions will deal with the subject prospectively in view of present world conditions and that the effect of the Monroe Doctrine on the relationship of the Americas will be within the scope of the discussions.

Time when essay must be submitted:

On or before February 15, 1941.

Amount of Prize:

Three Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, members of the Board of Governors, officers, and employees of the Association.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to six thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and the absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest shall communicate promptly with the Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish further information and instructions.

Leading Articles in Current Legal Periodicals

By Kenneth C. Sears
Professor of Law, University of Chicago

CONSTITUTIONAL LAW

Interstate Commerce in Intoxicating Liquors Under the Twenty-first Amendment, by Joseph E. Kallenbach, in 14 Temple U. L. Qu. 474. (July, 1940.)

From a strong national but not exclusive control of liquor under the Eighteenth Amendment public opinion swung to the Twenty-first Amendment prohibiting the transportation into a state for delivery or use therein of intoxicating liquor in violation of the laws of the state. And the Supreme Court has given a literal interpretation to the language of the latter amendment. The Commerce and Equal Protection Clauses are not barriers to state action concerning intoxicating liquor. This attitude has been criticised by other commentators but it is defended by Mr. Kallenbach even though the states in many instances have abused their power. However, this tendency of the states to exploit their power for purely protectionist purposes is deplored. There is some evidence of a current legislative reaction in the states in favor of a policy of self-restraint and refusal to yield to pressure for local favors.

INTERNATIONAL LAW

A Preface To The Law of Neutrality, by Charles Chauncey Savage, Jr., in 14 Temple U. L. Qu. 429. (July, 1940.)

Presumably this brief discussion will not be "news" to those well versed in international law. But others should be interested in a well written explanation of how "everything was settled" concerning naval warfare and neutral rights and duties by the Hague Convention of 1907 and the London Naval Conference of 1909 only to have the World War of 1914-1918 unsettle everything. It is necessary to know about absolute and conditional contraband, free list, visit and search, control ports, continuous voyage and ultimate destination, the navicert system, and blockades. The present war has brought forth such statements as: "There isn't any international law any more." Professor Savage replies: "It may be that the world will again be united under one government as it was in the days of Augustus Caesar, and again under Charlemagne, men whose very names became titles. If so, municipal law will supersede or absorb international law. But if independent states continue to exist, as seems almost certain in the Western Hemisphere and probably in the Eastern Hemisphere, there will be international law to govern their conduct, however much changes in policy and in ways of living may change the law as we have known it."

JURISDICTION

Jurisdiction And Collateral Attack: October Term, 1939, by Bennett Boskey and Robert Braucher, in 40 Columbia L. Rev. 1006. (June, 1940.)

Five opinions in *Chicot County Drainage District v. Baxter State Bank, Kalb v. Feuerstein, United States v. United States Fidelity & Guaranty Co., Union Joint Stock Land Bank v. Byerly,* and *Sunshine Anthracite Coal Co. v. Adkins* seem to prove that the application of res judicata principles to questions of jurisdiction in view of the full faith and credit clause has produced a troublesome situation. The axiom that a wrong decision by a court that it had jurisdiction of the subject of the action is void, even though it had by concession jurisdiction of the persons, has suffered the fate of most axioms. In the 1938 term the Supreme Court decided that if the question of jurisdiction over the subject matter was litigated, the principle of res judicata would apply to the decision. In 1939, the question remained: "Were parties over whom the court had personal jurisdiction concluded by its judgment as to jurisdictional issues not expressly litigated?" The cases just decided seem to give an affirmative answer to this question. But there are two limitations, at least, to this answer. One is that "the newly dominant doctrine of res judicata may be overridden by a countervailing policy, at least when that policy is embodied in an act of Congress. The other limitation is one that concerns the immunity of the United States from suits. The particular case concerned the United States, as trustee for the Choctaw and Chickasaw Nations, but the lack of jurisdiction was stated in broad language. The last word of the Supreme Court is that "in general the principles of res judicata apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties."

LEGAL HISTORY

The First Decade of the Supreme Court of the United States, by Charles Warren, in 7 U. of Chicago L. Rev. 631. (June, 1940.)

Another of Mr. Warren's historical addresses proved to be interesting reading. Yet the contents are not exciting. The Court started slowly and its place in history was a matter of growth. The most exciting work of the Supreme Court during the first decade seems to have been the eight suits against states of the Union that were filed. Its "most notable action" was the refusal to render advisory opinions at the request of President Washington. Most surprising may be the fact that jury trials in the Supreme Court occurred during this period. Marshall, Kent, and Story, in their declining years, apparently became pessimistic about the future of the Court and the Constitution. "If any man is inclined to be pessimistic as to occurrences of recent years, he should be cheered by the thought that for seventy years after 1801, conflicts with the judiciary were much more serious and more intense than any which have occurred in the seventy years last past."

PROCEDURE

A Septennium of English Civil Procedure, 1932-1939, by Robert Wyness Millar, in 25 Washington U. L. Qu. 525. (June, 1940.)

This review of procedural and evidential reforms in England has an optimistic note for us. We have been engaging in reforms of our own and here and there we have advanced beyond the English. The Federal Rules of 1938 are our most noteworthy effort. However "in some quarters the existing order of things is still regarded with too much complacency" and "to a very considerable extent the conditions of jury trial remain unsatisfactory."

RAILROADS

The Case for a Special Railroad Reorganization Court, by Cassius M. Clay; *The Judicial and Administrative Mechanism of Section 77,* by Leslie Craven:

both in 7 Law and Contemporary Problems, 450, 464. (Summer, 1940.)

In an issue devoted to a number of articles concerning railroad reorganization, special interest in current legislative proposals is to be expected. What can be done to help our sick railroads? Two and a half years have elapsed since President Roosevelt held his conference on transportation and sent his special message to Congress, asking for "immediate" relief. Both authors are agreed that Section 77, even as amended in 1935, is not sufficient to solve the problem. Mr. Clay favors the creation of a special railroad reorganization court such as that proposed in Senate Bill 1869 which has passed the Senate. After setting forth arguments for and against such a court, he indicates but does not make clear his choice of the Senate Bill rather than either of two House bills, both of which would establish a court composed of one district and two circuit judges for each case as it arose. Mr. Craven believes that physical reorganization is needed through abandonments and consolidations. But the labor vote talks at this point and thus the proposed legislation is limited to corporate reorganization. Under Section 77 a court can approve a plan of reorganization only if it has been approved in every respect by the Interstate Commerce Commission. This arrangement secured a desired reform but it may result in delay in obtaining an agreement of the court and the Commission. The proposed legislation has varying proposals as to the role of the Commission but all of them would reduce its present power over reorganization. So, Mr. Craven, thinking well of the Commission, does not favor a special court. Instead, present judicial procedure could be strengthened by making use of a three-judge court. The Commission should continue to pass on all provisions of a plan, and there is much to be said in favor of not upsetting its findings of fact if sustained by substantial evidence. But a "court would always be free to upset any plan not sound from the standpoint of legal principles."

TORTS

Another New Tort? by Paul A. Leidy, in 38 Mich. L. Rev. 964. (May, 1940.)

The question is whether the Supreme Court of Washington established a new tort in its decision of *Baxter v. Ford Motor Company* in 1932. Baxter bought a new Ford after the manufacturer had supplied the local dealer with advertising material which described the new "Triplex shatter proof" glass windshield—one that will not "shatter under the hardest impact." Apparently this furnished the basis for similar statements made by the local dealer. Then for an unknown reason, it seems, the windshield shattered when hit by a pebble which was thrown up by a passing car. A piece of glass penetrated plaintiff's eye and he eventually recovered a judgment against the Ford Company. Many theories have been advanced to explain the result which cannot be based upon negligence in making the product or upon a negligent statement concerning it. There was no proof to support either of these theories. The author of the discussion appears to be unfavorable to the decision despite the fact that it has been approved by some commentators and followed recently by the Michigan Supreme Court. A suggested justification is the notion that the defendant manufacturer created an unreasonable risk.

TRADE REGULATION

New Directions in the Law of Unfair Competition, by Edward S. Rogers, in 74 New York L. Rev. 317. (June, 1940.)

In a lecture before the Association of the Bar of the City of New York, Mr. Rogers gave an abbreviated course in the law concerning the use of trade-marks. A trade-mark includes a trade name and many of the most interesting cases are concerned with the names of persons who sell goods or with the names of the goods which are sold. There have been two theories concerning trade-marks: (1) that they are property and that an infringement is a trespass on the property; (2) that what is actionable is the false representation and that trade-marks are merely the instrumentalities by which this is done. The latter theory, known as the Holmes-Hand doctrine, is the one favored by the lecturer. Apparently, however, it does not make a great deal of difference which theory is adopted, for, "if you *must* have a property right, you might think of it as the right of every businessman to a remedy when his reasonable expectation of custom is artificially interfered with." Interesting and revealing is a conference with a French lawyer who looked at the Code and then advised that there was no law, "nothing can be done." The flexibility of the Anglo-American common law seems preferable to that. "The fact that there is no precedent makes no difference at all." And this commentator wonders whether this attitude of the French lawyer is not the fundamental reason for the collapse that occurred on the Western front in May and June, 1940.

TRADE REGULATION

Unfair Competition, by Zechariah Chafee, Jr., in 53 Harvard L. Rev. 1289. (June, 1940.)

It is valuable and interesting to be able to stand on a height and survey in a scientific manner the developments of a field of law over the past centuries. As this has been done by a professor who has a gift for clear and easy expression, the lawyer may read his lecture with pleasure rather than by ordeal. There are many "dirty tricks" in the business world and the question is how far should the courts proceed to prevent them by injunction or compensate for them by awarding damages. After developing the fact that what were regarded as distinct wrongs have now been largely amalgamated into the concept of unfair competition, the question arises how to overcome the harm that is likely to be done to this body of law by the decision in *Erie Railroad Company v. Tompkins?* "In an era of nationwide businesses the Supreme Court has suddenly formulated an extreme doctrine of State's rights." Since registered trademarks are probably immune from this doctrine it is suggested that Congress extend the policy of registration and make it compulsory as far as constitutionally possible. What should be the future of unfair competition? Conservatism which says that the doctrine should stop where it is and Conquest, which urges that the doctrine should go forward to include its popular meaning, viz., every dirty trick, are both rejected. "Between Conservatism and Conquest lies a third policy, which I call Exploration." This involves a cautious advance where this seems clearly advisable. But "the courts may think it wise to keep permanently away from some competitive injuries, leaving the defendant to the tender mercies of the Federal Trade Commission, the Better Business Bureaus, social ostracism, or his own conscience."

LAW BOOKS AND LAWYERS*

ONE of the committee reports at the Philadelphia meeting of great practical interest to all the lawyers of the United States is that of the Special Committee on Legal Publications and Law Reporting. A short digest of the work of the committee is given at page 830 of the November JOURNAL. *The matter of law books, in the modern lawyer's world is so important to all members of the profession, that further comment on this report is here given.*

In its unusual approach to its task, and in the material which it has collected for future study and research by students of the "Law Book Problem," the ABA Committee on Legal Publications and Law Reporting has proved itself to be able as well as hard working. The chairman is Professor James E. Brenner of the Law School of Stanford University, who is responsible for the conception and the execution of the work of the committee during the past two years. The other members of the committee are Professor Hugh J. Fegan of Georgetown University Law School, Washington, D. C.; Mr. Emmet La Rue, a trial lawyer of Rensselaer, Ind.; Hon. John A. Rawlins, District Judge, Dallas, Texas; and Harry Cole Bates, a practicing lawyer of New York City.

The recommendations of this committee are based on an imposing amount of research work and statistical investigation carried on largely by means of questionnaires sent to lawyers all over the country. The statistical tables upon which most of the recommendations are based are the result of questionnaires sent to members of the bar in sixteen typical states, including New York, Indiana, Ohio, Alabama, Illinois, Michigan, Kentucky, Texas, California and Washington. The recommendations of the committee, eight in number, were all approved at Philadelphia, by the Board of Governors, and also by the House of Delegates. For all practical purposes that means these recommendations have behind them the force of official approval by the Association. The report and the statistical tables supporting it may be found in the "Advance Program," being the blue pocket-size pamphlet sent to each member of the Association in advance of the Philadelphia meeting. It is expected that the report and the statistical tables will also be reprinted in the Annual Report of the Association. The 8 separate recommendations are set out in full at page 820 of the November JOURNAL, and accordingly will not be repeated here. However, they deserve a word of comment in such a discussion as this.

*In this connection, see prior article, "*Volume of Judicial Decisions*," in July, 1940, issue of the* JOURNAL.

Substance of Recommendations

So far as the matter of law books *per se* are concerned, the major reforms recommended by the committee may be summarized as follows:

A. Local bar associations are urged to appoint committees to study and suggest solutions to local problems that make for duplication and the high cost of legal publications.

B. The attention of courts of review is called to the fact that the majority of the attorneys surveyed would prefer:

1. Shorter written opinions.
2. Memorandum opinions in all cases where the law is already settled.
3. The omission of pure dicta.

C. Courts of review are respectfully requested to give consideration to the following suggestions as a possible means of reducing the length of opinions:

1. Adopt a rule, restricting briefs on appeal to 75 pages or less, except when a longer brief is authorized by the court.
2. Limit the number of supplemental briefs.
3. Except in unusual instances, omit the history of the principle of law which is being considered.
4. Omit long lists of citations.
5. Omit long quotations from other cases.

D. It is the considered opinion of the committee, that:

1. The time of publication of sets of digests and encyclopedias in the same field of the law should be staggered, in the interest of the profession and the publishers alike.
2. There is at present unnecessary duplication of digests, encyclopedias and loose leaf services.
3. Representative law-book publishers should in self-interest, if for no other reason, explore all proper means to avoid such unnecessary duplication.

Duplication of Reports

The detailed report of the committee is itself of such interest to lawyers who buy law books that it deserves consideration by all members of the profession. Significant parts of the report are here summarized.

The first topic discussed is that of duplication of Law Reports. Some of the more pertinent discussion on this subject is here given.

State Law Reports

In most states the majority of attorneys appear to be subscribers to the state reports of their respective states but only a small fraction have the state reports of other states. In two of the sixteen states, Michigan and Washington, over 90 per cent of the attorneys have the state reports; in five others, 84 per cent or more; and in four others, 70 per cent or more have them.

National Reporter System

There is a wide spread in the percentages of attorneys in the states surveyed who subscribe to the unit of the National Reporter System which covers their respective states. The results of the surveys indicate that this spread ranges from 8.9 per cent in Michigan to 94.1 per cent in Florida.

The number of attorneys who subscribe to units of the National Reporter System for states other than their own is much higher than for the state reports. The highest percentage is 47.8 in South Dakota, and the lowest is 8.0 in Michigan.

Unnecessary Duplication

In five states, Ohio, Kentucky, New York, Texas, and South Dakota, the results indicate that the majority of the attorneys believe there is unnecessary duplication. The highest percentage in this group is 82.7 in Ohio. In four additional states over 42 per cent are of the opinion that there is unnecessary duplication; while in two states, Maryland and Washington, less than 19 per cent take this view.

Savings for Lawyers

The committee discusses at some length the very practical results, which have been achieved in California, and elsewhere in saving expense for law books to lawyers. On this point the committee said, in part:

Results in California

That the facts obtained through these surveys can be used to advantage by state committees is indicated by what has been accomplished in California. In that state a saving to the attorneys of over $100,000 during the period of the existing contract for the publication of the California reports has been made possible through the activities of the State Bar Committee on the Duplication of Law Reports.

Illinois

Illinois is another example of what can be done by a study of the local problems. Thousands of dollars

have been saved to the lawyers of that state by the publication of an approved edition of the annual state statutes. This is the result of action taken by the state bar association. [In Illinois this result is also partly due to commendable co-operation on the part of the publishers.]

Other States

The committee also discusses the progress made in Michigan. The result in that state is a reduction of $1.00 per volume for the state reports. With 4 or 5 volumes annually, that means a saving every year, as compared with prior prices, of $4 to $5 for every subscribing lawyer in the state.

The report also discusses at some length the arrangement by which the Bar Associations in Oklahoma and Kentucky were able to secure substantial reductions in the cost of the state reports for those states.

Point of View of Law Publishers

Any lawyer who is familiar with the main aspects of this question of "Bulk" in modern law books, knows that the fault is not entirely due to the Law Book Publishers—although they have some share in the blame. The Committee as a matter of fairness presents the point of view of the publishers, on two points.

Views of a Leading Publisher

"*Responsibility of the judiciary.* There is no question but what the lawyer is being overburdened and his income seriously depleted by the great number of books published which he may feel compelled to buy irrespective of any high pressure salesmanship. This situation is not altogether the fault of the law publishers. In the first place, a large part of the responsibility lies with the judges of the various appellate tribunals throughout the United States. They write lengthy opinions in practically every case, irrespective of whether the case involves well-established principles or not. The stenographer, the dictaphone, the law clerk, and the typewriter have all been conducive to the writing of long and verbose opinions. These opinions run into many pages and these pages run into volumes so that if the lawyer wishes a set of his state reports he buys an enormous amount of duplicitous material for which the publisher is in no way responsible. As a matter of fact, a great many of the opinions would be adequate for every purpose if the judges reduced them to headnotes followed by a brief and concise statement of facts. . . . The lawyer needs law reports but due to their multiplicity, they constitute his largest single outlay and are a hidden tax on his every other purchase.

The responsibility of the lawyer. We feel that the opinions of Appellate Tribunals *only* should be published and perhaps these, in turn, should be limited to courts of last resort. There is no occasion to publish the opinions of *nisi prius* judges as is done in some states, notably Ohio and Pennsylvania. New York is overburdened with reported cases. Of course, if the lawyers demand it the publisher stands ready to put them out. That is his business. It follows that the lawyer is largely responsible for the position in which he finds himself. He demands that every case be covered but wonders how it happens that the cost is so great. For instance, take an incident that happened in connection with our own company. We had published a local book. A lawyer from that state wrote in wanting to know how it happened that we had omitted a certain case, giving its name. From the tone of his letter we assumed that it must be a case of considerable consequence. When we checked it up we found that it was nothing more than a memorandum opinion. When we looked to see who the attorneys in the case were, our correspondent was one of them. He wanted to see his case listed even though it was nothing but a memorandum opinion.

Let the judges write less and the lawyers buy less by the pound and there will be smaller, cheaper and better law books."

Views of Another Large Publisher

"On the question of the state reports versus the reporter system, our prediction is that eventually there won't be any option which the lawyers will buy because the state reports are rapidly going out of use because of the tardy and incompetent manner in which they are published . . . In most of the states in the country the state reports are allowed to go into disuse because they are so badly published. Our suggestion, therefore, is to have your committee make an effort to get the state reports published in a proper manner."

Statistical Tables

Two of the Tables set forth in the report are of particular interest to the law-book buying part of the profession. They show in a graphic way the views of the profession as to (1) the comparative utility of the various standard types of law books; and (2) the overcrowding of the field by competing publishers. These two tables particularly, are recommended for study by the lawyer who desires to get to the bottom of this Law-book Problem.

Conclusions as to Duplication

The Committee states that the problem differs somewhat from state to state, and that no standard formula can be applied to the entire country. In some states the situation is more acute than in others. The Committee continues:

Almost continuously since its inception the American Bar Association has had committees studying the problems of the duplication of law reports. Previous committees have made thorough studies of the problem and almost without exception they have come to the conclusion that there is duplication, but like your present committee they have not been able to suggest solutions which can be applied uniformly to all states.

This committee agrees with the conclusions of other committees that there is duplication. The facts obtained by the Committee indicate that very little can be accomplished through the national approach. These same facts and the results obtained by the state bar associations which are giving serious attention to the problems indicate that a great deal can be accomplished through the state bar association approach.

General Conclusions

Some general conclusions are then set forth as follows:

In addition to the surveys mentioned above the committee has held conferences with representatives of a number of the large law book publishing companies. The committee has found most of the law book publishers ready and willing to co-operate with the attorneys in trying to solve the problem of duplication. . . .

Finally, except in the case of the state reports, offering of law books are controlled by the law book publishers who, the committee has assumed and has confirmed by conference with representatives of several, are properly actuated by intelligent self-interest. Consequently, control of the extent of their publications can best be accomplished by the bar's refraining from purchasing unnecessary or unworthy books. At least a partial solution of the general problem is thus in the hands of the bar.

"Bulk" in Law Books

For more than half a century (as already suggested) the American Bar Association, through one committee after another, has struggled with this question of "Bulk" in Law Books. The efforts of the Association have helped, in some ways, to control the out-pouring of books. But the flood still threatens to overwhelm the profession. The report which has been digested here, is one of the ablest and most effective, and at the same time most constructive presentations of the problem which has so far been made.

Team-work Required

But the task is far from being ended. The main fight is still ahead. It will require intelligent and vigorous and continued cooperation or "team-work" on behalf of the Bench, the Bar and the Publishers alike. They are equally responsible for existing conditions, and equally capable of self-reform. As Dean Wigmore says in the conclusion of the preface to his (1940) Third Edition of *Evidence*:

"If Legislators will continue, so copiously to legislate, and if Judges still refuse to justify with jejunity their judgments shall not Authors [and Law Publishers] continue assiduously to amass and to annotate these luciferous lucubrations for the benefit of the Bar, so long as the Bar incumbently bears the burden?"

U. A. L.

JUNIOR BAR NOTES

By James P. Ecomomos
Secretary of the Junior Bar Conference

State Chairmen

THE most important cog in this organizational structure of the Junior Bar Conference is the State Chairman. This office requires an active energetic and effective man. It is through the assistance of these key men that the Conference hopes to carry out the program adopted at its annual meeting in Philadelphia.

Chairman Lewis F. Powell, Jr. of Richmond, Va., is able to report that the Conference is active in all but a few states. The men who have accepted appointments as State Chairmen are as follows:

Alabama—T. Julian Skinner, Jr., Birmingham.
Arizona—Phil J. Munch, Phoenix.
Arkansas—Bronson Cooper Jacoway, Little Rock.
California—Calvin E. Helgoe, Los Angeles.
Colorado—John W. O'Hagan, Greeley.
Connecticut—John Keogh, Jr., South Norwalk.
Delaware—William Poole, Wilmington.
District of Columbia—John K. Cunningham, Washington.
Florida—Donald K. Carroll, Jacksonville.
Idaho—John J. Peacock, Weiser.
Illinois—Francis P. Linneman, Chicago.
Indiana—Julius Birge, Indianapolis.
Iowa—Irving W. Meyers, Des Moines.
Kansas—John H. Hunt, Topeka.
Kentucky—Angus McDonald, Lexington.
Louisiana—Richard C. Cadwallader, Baton Rouge.
Maine—Bradford H. Hutchins, Waterville.
Maryland—R. Lee Slingluff, Jr., Baltimore.
Massachusetts—John E. Buddington, Boston.
Michigan—Richard H. Paulson, Kalamazoo.
Mississippi—Sherwood W. Wise, Jackson.
Missouri—Arthur O'Keefe, Jefferson City.
Montana—Wesley W. Wertz, Helena.
Nebraska—Paul T. Miller, Scottsbluff.
Nevada—Bruce R. Thompson, Reno.
New Jersey—Herzel H. E. Plaine, Newark.
New York—Lyman M. Tondel, New York City.
North Carolina—Egbert L. Haywood, Durham.
North Dakota—Carroll E. Day, Grand Forks.
Ohio—E. Clark Morrow, Newark.
Oklahoma—Kavanaugh Bush, Tulsa.
Oregon—Thomas J. White, Portland.
Pennsylvania—J. Pennington Straus, Philadelphia.
Rhode Island—Alfred H. Joslin, Providence.
South Carolina—Nathaniel Wilson Cabell, Charleston.
South Dakota—William S. Churchill, Huron.
Tennessee—C. S. Carney, Jr., Ripley.
Texas—William A. Cline, Wharton.
Vermont—Louis Lisman, Burlington.
Virginia—William Rosenberger, Jr., Lynchburg.
Washington—George T. Nickell, Seattle.
Wisconsin—J. Stewart Murphy, Milwaukee.
Wyoming—Philip White, Cheyenne.

Objectives for 1940-41

These state chairmen are now engaged in finding members of the Conference who will undertake to promote the membership and public information activities under the supervision of the national chairman of the Membership Committee, Willett N. Gorham of Chicago, and National Director of the Public Information Program, Paul F. Hannah, Washington, D. C. Chairman Powell reports that substantial progress has been made with the appointment of these state membership chairmen and state and local directors of the Public Information Program.

Mr. Hannah has already advised the state and local directors, now acting, of the objectives adopted at the Philadelphia meeting. These are as follows:

a. To inculcate a deeper understanding of, and devotion to, the democratic way of life and to rebuff attacks upon it.
b. To bring to the attention of the public the present threats to the American system from within and from without, and the imperative necessity for immediate action to meet such threats.
c. To suggest effective outlets for the energies of American citizens desiring to express their spirit of loyalty and of service to the nation.
d. To cooperate in such manner as may be deemed advisable by the Council with any agencies promoting the national defense.

He further suggests that topics suitable for the program include "The Fifth Columnist at Work", "Labor under a Totalitarian State", "The Bill of Rights under Dictators", "The Collapse of Democracy in France" and "The Part of South America in National Defense."

National Defense

The Selective Service Law embraces every member of the Conference. This creates the problem of how to assist the profession in devising a means to protect the practice of young lawyers called into military service. Obviously it is advisable that adequate plans be formulated to meet this situation as soon as possible. The Conference is cooperating with the Senior Committee on National Defense. Edmund Ruffin Beckwith of New York City, a staunch friend of the Conference, is the National Chairman of this important committee.

State Activities

The New Mexico Junior Bar Conference reports through Mrs. Eva Thomas, Santa Fe, Secretary-Treasurer, that on September 27, 1940, at the annual meeting in Albuquerque, a full State Council of nine members was chosen.

Harry T. Coffman, Lyndon, Kansas, Secretary of the Kansas Junior Bar Conference, advises that the Executive Council will meet December 1st in Emporia. State Chairman John H. Hunt, Topeka, has appointed committees on Personal Finance Surveys, Juvenile Crime Prevention, Selection of Judges and a Director of Publicity.

Robert S. Williamson, Springfield, Illinois, Chairman of the Committee on Younger Members Activities of the Illinois State Bar Association, has scheduled a breakfast meeting of his committee. It will be held at the Stevens Hotel, Chicago, on November 29th as a part of the program of the annual reception to the Illinois Supreme Court Judges. Austin J. Doyle, Chicago, is Vice-Chairman and Mark Roberts, Springfield, is secretary of the committee.

Washington Letter

Post-Election Washington

THE changes evident in the Nation's capital since the November election are few. Whether there are underlying currents which may come to the surface farther down the contour of history, your reporter cannot say, not being a dowser nor anywise gifted in the art of rhabdomancy. If November 5th is to be construed as no impetration for a new or different kind of mandate from the people to the present administration, it is on the other hand a definite approval of the administration by a substantial majority of the people.

A good illustration of a very prevalent attitude is found in a sort of peroration which Congressman Marvin Jones, of Texas, delivered on the floor of the House and which marks the end of his nearly twenty-four years of service in Congress. Representative Jones has been appointed to the Court of Claims. He said that one of the noticeable things in connection with his service in that body was "the spirit of fair play which exists among the members of the House"; and continued by saying:

> This reflects the same spirit that in large measure prevails throughout the country. You sometimes hear a man spoken of as a good loser or a bad loser. Frequently this depends upon whether the winner is a good winner or a bad winner.
>
> During our campaign, sometimes in our enthusiasm we use rather strong terms. Frequently people visiting this country during campaign years wonder if there is going to be an uprising or a civil war or at least some riots. When the campaign is on and the X's are the majority party, I can prove by most any Y that the X's are extravagant, wasteful, careless, incompetent, and in fact wholly incapable of administering the affairs of the Government. When the Y's are in power no proof is necessary. [The X and Y symbols are used here instead of the real party terms used by the Congressman.]
>
> The next morning after a campaign is over and the votes have been counted, Bill, in walking down the street, meets his neighbor Tom. Tom says to Bill, "We licked you yesterday." Bill replies with a smile, "Yes, but we will get you next time." Tom replies, "You will never do it." They forget the contest and together they continue to build America. [Applause.] Bill is a good loser because Tom is a good winner.
>
> In some countries, however, when an election is over, the losing party takes to the woods because they know that the winning party has guns and is likely to use them. They are poor losers because their adversaries are poor winners.
>
> One of the basic principles of our land is the recognition of the rights of the minority and the protection of the rights of the individual. This helps to maintain the right to our free opinions without risking the loss of other things which we possess.

The point of Mr. Jones's remarks, about the spirit of fair play rising above partisanship, was illustrated immediately following his speech when the members from both sides of the political aisle seemed to vie with each other in paying tributes of respect to their retiring brother member.

The keynote of the farewell remarks addressed to Mr. Jones might be found in the speech of Representative U. S. Guyer, of Kansas, a member of the other political party, who spoke of his friend "Congressman Jones, who is soon to become Judge Jones of the Court of Claims. I know that the House shares my sentiments and good wishes in the new opportunity to serve his country where his even temperament, his fine balance of judgment, and legal discernment will find a rich field for exercise and usefulness."

Key Pittman

Forthright diplomacy has lost one of its strongest exponents in the passing of Senator Key Pittman, Chairman of the Foreign Relations Committee of that body. His death occurred five days after his recent reelection. He had conducted a strenuous campaign and was ordered to bed by his physician shortly before election day. Later he suffered a heart attack.

Senator Pittman was one of the original advocates of an effective embargo on Japan. Before the outbreak of the present war in Europe, he said:

> The policy of appeasement has not only been unsuccessful and ultimately destructive, but has been immoral. It is evident that no person can die but once; the period of life is limited, and it is far better that he die a few days earlier for Christianity, justice and liberty than that he live a little longer in cowardice and degeneracy.

Senator Pat Harrison, of Mississippi, said in commemoration of him: "He was a profound student of international affairs and his position as chairman of the Foreign Relations Committee made it possible for him to champion constructive legislation dealing with many phases of international relationship. He was a progressive westerner and courageous American whose counsel in legislative policies and party affairs was always sought and was always worthwhile. His loss will be keenly felt." Foreign Minister Wang Chung Hui, of China, said: "Senator Pittman's forthright attacks on aggression, international lawlessness and his constant championing of all nations defending their liberty will be greatly missed."

In the statement made by Senator King, of Utah, in the Senate chamber he said:

> "Senator Pittman led a colorful life. He left his native State of Mississippi after receiving high honors in educational institutions and for a number of years engaged in the practice of law in the State of Washington. From there he went to Alaska, at a time when there was much of drama and romance in that remote part of the United States. There he was an outstanding figure and contributed to the development of that important part of our national domain. After spending a number of years there he took up his residence at Tonepah, Nevada, and since then has been a resident of that state.
>
> Senator Pittman never ran for any office other than that of United States Senator and his experience of coming into that office was quite unusual. He first ran for the place against George Nixon, the Republican incumbent, in 1906. At that time Nevada was in the process of deciding on the direct primary system; but at that election, as well as previously, the Senators had been chosen by the State Legislature. However, Mr. Nixon and Mr. Pittman entered a gentlemen's agreement that whichever one of them should receive the largest popular vote should be Senator. Mr. Nixon polled about 1,100 more votes, but the State and Legislature was Democratic and proceeded to choose Mr. Pittman. But he per-

suaded them to reconsider and designate Nixon according to the candidates' agreement. Mr. Nixon died after serving about four years. Mr. Pittman was elected in 1912 and took his seat."

The anticipated new Chairman of the Senate Foreign Relations Committee is Senator George, of Georgia. He has been referred to as a soft-spoken man. For a long time he has been a friend and confidant of Secretary of State Hull. Mr. George has said: "I have never been an isolationist nor have I been for intervention. I favor making the whole Western Hemisphere economically as well as militarily immune from attack."

In addition to Senator Pittman, five Senators have died since the election of the Seventy-sixth Congress, in 1938. They were: J. Hamilton Lewis of Illinois, M. M. Logan of Kentucky, William E. Borah of Idaho, Ernest W. Gibson of Vermont, and Ernest Lundeen of Minnesota. During the same time, twenty-eight members of the House of Representatives have died.

Congress and the Constitution

Is there any mandatory and enforceable requirement on Congress which compel it to carry out the provisions of the Constitution as to its own action? An interesting question has been raised, in some legal circles in Washington, on this point. The particular case grows out of the legislative status of the Satterfield bill, H. R. 7737, the so-called "State Intervention," bill. This bill would "amend the Judicia Code by adding a new section thereto, designated as Section 266a, to provide for intervention by States in certain cases involving the validity of the exercise of any power by the United States, or any agency thereof, or any officer or employee thereof." It is an interesting piece of legislation on its own account, but that is another story. A thorough discussion of it appears in the Congressional Record for August 5, 1940, pp. 15069 to 15075.

At the time this is written, the bill has been re-passed by the House over the President's veto; but the Senate has not acted on it since the veto. The query is whether the Senate must take action one way or the other before it may adjourn. It is reported hereabouts that some "constitutional lawyers" are saying that it must.

If the President does not approve and sign a bill, he is required to return it with his objections to the House in which it originated "who shall enter the objections at large on their journal and proceed to reconsider it," to determine whether it will pass by a two-thirds majority. There seems no doubt that the requirement is that they *shall* proceed to reconsider it. If it passes the House, which originated it and to which it has been returned, by a two-thirds vote, it shall be sent together with the objections to the other House "by which it shall likewise be reconsidered." (Constitution, Art. I, Sec. 7, cl. 2). Again the word *shall* is used.

Nothing is said by the Constitution in this connection about any particular sessions of Congress nor any time within which Congress must take the action required. It is, however, in the latter part of the same paragraph that the provision appears as to the President's "pocket veto." This is the requirement that he return the bill within ten days (Sundays excepted) after it was presented to him or it will become a law; unless the adjournment of Congress prevents its return, "in which case it shall not be a law" (the pocket veto). These provisions would seem to contemplate an expeditious handling of the bill throughout all stages, following its original passage by the two Houses of Congress.

But, might it not as reasonably be argued that the lack of a time requirement for the second action by the two Houses, at the place where a time requirement was being made for the Executive's action, indicates an intention to leave the matter wide open as to the time within which the several Houses "shall" reconsider the vetoed bill? Getting down to the present case, is there any legal reason why the Senate might not wait six months or six years to take up the reconsideration of the Satterfield bill?

Millis to Labor Board

The choice of Dr. Harry A. Millis, of Chicago, to be a member of the Labor Board is regarded here as especially fortunate. He is a man given to facts and figures, deliberate but decisive in action and of very broad experience in education and economics, as well as in the mediation of labor controversies. He is a native of Indiana and has taught economics at the Universities of Arkansas, Stanford, Kansas, and Chicago. Recently he has been engaged in making a study of collective bargaining for a research organization, the Twentieth Century Fund. Within recent weeks, he was selected jointly by the General Motors Corporation and C.I.O.'s United Auto Workers as an impartial arbiter under that union's new contract with General Motors. While Dr. Leiserson, who is also on the Labor Board, was chairman of the Railway Mediation Board, Dr. Millis frequently was called in to serve as referee in disputes over the interpretation of employee contracts. Dr. Millis was chairman of the Board of Arbitration in the men's clothing industry in Chicago from 1919 to 1923. The term of his recent appointment to the National Labor Relations Board is five years. The third member of the Labor Board is Edwin S. Smith.

Conference of Section Chairmen at Chicago

PURSUANT to the recommendation adopted by the House of Delegates at the Philadelphia meeting (AMERICAN BAR ASSOCIATION JOURNAL, November 1940, page 825), a conference of the Section Chairmen of the Association and the subcommittees of the Board of Governors on Administration and Sections, was held at Chicago on November 9th. Those present included: President Lashly; Thomas B. Gay, Chairman of the House of Delegates; Treasurer, John H. Voorhees; Executive Secretary, Olive G. Ricker; Assistant Secretary, Joseph D. Stecher; Carl V. Essery, Chairman of the Subcommittee on Sections; Carl B. Rix, Chairman of the Budget Committee, and the following Section Chairmen or other Section representatives: Burt J. Thompson, Bar Organization Activities; John M. Niehaus, Jr., Commercial Law; James J. Robinson, Criminal Law; Howard C. Spencer, Insurance Law; John T. Vance, International and Comparative Law; James W. McClendon, Judicial Administration; Philip H. Lewis (Vice-Chairman) Junior Bar Conference; James P. Economos (Secretary) Junior Bar Conference; Ronald J. Foulis, (Past Chairman) Junior Bar Conference; W. E. Stanley, Legal Education and Admissions to the Bar; Alvin Richards, Mineral Law; Martin H. Foss (representative) Municipal Law; Loyd H. Sutton, Patent, Trade-Mark and Copyright Law; Elmer A. Smith (Secretary) Public Utility Law; Harold L. Reeve, Real Property, Probate and Trust Law, and George M. Morris, Taxation.

In opening the discussion, President Lashly reviewed briefly the matters considered at the conference of Section chairmen held in 1939 and directed particular attention to those subjects involving the program for the annual meeting. He suggested the desirability of giving further consideration to plans for making the annual meeting more attractive, including the improvement of Assembly programs, and to the problem of the large number of concurrent attractions.

The ensuing discussion revealed a consensus of opinion substantially in

accord with that expressed at the 1939 conference. Dissatisfaction with the conflicts arising out of concurrent meetings continues to exist among many members of the Association, but it was recognized that the problem is one difficult of solution. It was proposed that certain Sections might hold joint meetings on a subject of mutual interest, such as taxation, and thereby eliminate separate sessions, but it was stated that such sessions could not be utilized to eliminate the business sessions of the individual Sections.

A further proposal was made that the House of Delegates hold its sessions at a separate time, such as Friday and Saturday following the annual meeting. This suggestion met with criticism that members of the House could not be expected to remain over an extended period and an alternative proposal was submitted that those Sections dealing with specialized subjects of the law meet on Friday and Saturday preceding the annual meeting so as thereby to leave the meeting open for subjects of universal interest affecting all members of the Bar. Representatives of the Sections affected by such proposal were of the view, however, that such a plan would seriously curtail their attendance and damage their effectiveness.

Regarding the subject of Assembly programs, it was the general view that the membership desired to hear outstanding speakers and that the suggestion made last year that joint meetings of Sections be substituted for Assembly meetings was unwise and should not be followed.

The conference gave considerable attention to the recommendations adopted by the House of Delegates at Philadelphia, that a Section handbook be published; that the subcommittee of the Board of Governors on Sections act as a liaison between the Board and the Sections, so as to avoid conflicts and duplications and that there be a further study of the mechanics of the House of Delegates in considering and passing upon Section reports. (AMERICAN BAR ASSOCIATION JOURNAL—November 1940, page 825). After extended discussion of these matters, the conference adopted several resolutions setting forth the views of those present.

With respect to the proposed handbook, the conference recommended that a handbook or manual be prepared and distributed to Section officers, council members and committee chairmen, which would include a statement as to, (a) the jurisdiction of each Section; (b) the duties of the officers and committee chairmen with respect to the making of reports, etc., (c) the manner in which the respective Sections function, and (d) the manner in which the House of Delegates functions in considering Section reports.

The conference recommended to the Board of Governors that it extend the power of its subcommittee on Sections to coordination and appraisal of the work and structure of the Sections.

There was general agreement that the present method of considering Section reports in the House of Delegates be continued, but it was the sense of the meeting that the function of the committees of the House in considering such reports be limited to advising and reporting on (1) whether recommendations made conflict with the policy of the Association; (2) whether they are proper in form, and (3) whether they are clear.

Another subject provocative of extended discussion was the publication and circulation of Section reports and Section committee reports. It was felt that more information should be made available as to the work of the Sections and their committees. The views entertained by those present are reflected in a series of resolutions adopted by the conference. One declared it to be the sense of the meeting that the Section reports required by Article IX of the Constitution of the Association should be prepared by the Section chairmen and cover the period from the latest annual meeting of the Association to the time of filing the report and it was recommended that the distribution to the members of the Association required of the Secretary be construed as permitting a summary of all such reports.

Another resolution recommended that, after the conclusion of the Section's annual meeting, the Secretary of the Section, in collaboration with the chairman active at such meeting, file with the Secretary of the Association a summary account of the Section's meeting and the action taken therein and the action taken by the House of Delegates upon any report or recommendation of the Section, such summary to be published as a part of the Association's annual report for the period.

With respect to Section committee reports, some distinction was made between the Sections which require the payment of dues and those which do not. As to the former, the conference recommended that, so far as budgets will permit, such Sections distribute their committee reports in advance of the Section meeting to Section members and members of the House of Delegates and also consider the desirability of distribution to selected organizations, libraries, etc., interested in the field, and the printing of enough copies to be distributed to incoming Section members in the coming year. As to non-dues paying Sections, it was recommended that the question of publishing a given committee report be considered by the council of the Section on its merits, after consultation with the Printing Committee or the Administration Committee.

A suggestion that the Association employ an advisor or executive assistant provoked considerable discussion but found the members of the Conference in general agreement that there was need for such assistance insofar as general Association activities and the work of the pro bono publico Sections were concerned. It was pointed out that these activities are effective only insofar as the work is spread throughout the 48 states. A note of caution was interjected, however, when it was urged by several that such a proposal would not work satisfactorily unless such an employee were placed under the jurisdiction of a committee on scope and plan, which would not change from year to year and which would insure some continuity of plan and policy. The matter was referred to the Board of Governors, with the recommendation that it employ a full-time secretary of associational work whose duties shall be prescribed by the Board.

In conformity with one of the primary objectives of the Conference, President Lashly, in issuing the call for the meeting, requested each Section chairman to transmit to him a report of the program of work contemplated by the Section during the coming year. He reported that such replies had been received and appointed a subcommittee to review and digest them. This subcommittee, in making its report, announced that it had found many instances where several Sections contemplated dealing with the same subject matter. Among the subjects upon which it was found that two or more Sections were proposing committees to deal therewith were, Public Relations, Taxation, Administrative Agencies and Tribunals, Judicial Administration, Trust Law, Criminal Law, Financing, Unauthorized Practice, Legal Education, Coordination of Activities with State and Local Bar Associations and Membership Work. It was pointed out that there was an obvious necessity for coordination of these varying phases of overlapping activity and the suggestion was made that the Administration Committee designate a control Section for each subject and direct clearance of all activities relating thereto through such Section.

No formal action was taken on this subject, but the chairman of the subcommittee on Sections requested each Section chairman, who has not already done so, to report to his committee in detail as to the proposed work of his

Section and its committees this year and to keep the committee informed as to progress. It was also suggested that a further conference of the subcommittee and the Section chairmen be held at the time of the mid-year meeting of the House of Delegates.

Discussion of the question whether dues-paying Sections should be wholly self-sustaining led to the adoption of a resolution that as soon as possible all such Sections, except in an emergency situation, subsist on their own income.

Attention was directed to the possible effect of the draft on the revenues of the Association and of the consequent necessity for making a concerted effort this year to obtain new members. The Conference was informed that the Association expects to carry its members, who are drafted, without dues while they are in the service. It was suggested that the plan of requesting every member to get a member might work satisfactorily this year. A proposal made last year that each Section prepare a list of speakers on particular subjects which could be made available to state and local bar associations, was again presented to the Conference, it being the view that this type of service to local groups would promote good will and increase membership.

To those who have been privileged to attend these conferences of Section chairmen, their value to the Sections and to the Association generally has been demonstrated more forcefully each year. Members attending for the first time were impressed with the variety and magnitude of the problems presented by the complex activities of the Association and at the same time received a clearer understanding of how the Association functions. Those who have attended previous conferences all concur in the opinion that the one held this year was unusually helpful and constructive. All attest the usefulness of this procedure as a means of accomplishing coordination of the divergent activities of the several Sections and of making the Association a more effective instrumentality for professional and public service.

JOSEPH D. STECHER,
Assistant Secretary.

Inter-American Bar Association—Address of President Manuel Supervielle

On October 28 a testimonial dinner was given in Washington to Dr. Manuel Fernandez Supervielle, first President of the recently formed Inter-American Bar Association, who is also President of the Havana Bar Association, Cuba. The address of Dr. Supervielle was an event of such significance that it was broadcast to Latin America by National Broadcasting Co. short wave. The American Bar Association is an Association member of the Inter-American Association. President Jacob M. Lashly of the ABA expects to go to Havana to address the first convention of the Inter-American Bar Association some time in the early spring. In view of the wide interest in the matter, the JOURNAL *is glad to present some excerpts from Dr. Supervielle's address. He said in part:*

"In my first words I want to express my deep gratitude for this honor which through my modest person is being paid to the Cuban lawyers by our North American colleagues of the Inter-American Bar Association in cooperation with the Section of International and Comparative Law of the American Bar Association, the Federal Bar Association of the United States, the District of Columbia Bar Association, and the Women's Bar Association of the District of Columbia. . . . I am glad also to take this opportunity of extending to our colleagues of all the Americas the cordial and affectionate greetings of my people and of the lawyers of Cuba. I desire likewise to take advantage of this happy occasion to invite our colleagues of the entire Hemisphere, and the Bar Associations, national and local, to join the Inter-American Bar Association and to take part in its first Conference which is to meet in Havana the last fortnight of March this coming year, 1941.

The Inter-American Bar Association, organized in Washington last May, is called upon to exert a powerful influence in the destinies of America in these critical times in which humanity is now living, and in accordance with the essential purposes of its organization and the character and standing of the professional associations which now form and which will hereafter become members of it, and likewise the standing and character of the individuals who constitute those associations. . . . No one can fail to appreciate the transcendental importance of this new international association of the men of the profession of the law.

. . . In these times in which the whole world is living today, confronted with a formidable attempt by the believers in the philosophy of force to sweep the reign of law from the face of the earth and to subject to its yoke the peoples who now practice democracy and enjoy liberty,—in these times the Inter-American Bar Association,—this new Federation of the Bar Associations of the Continents of this Hemisphere,—is called to even higher and more exalted aims.

We, the men who practice law and who uphold justice as the essential work of our lives, cannot remain indifferent to the danger that threatens the democratic institutions of our nations and the liberties of our peoples. In the meantime, pending the moment which may perhaps not be so far away, when it may be necessary for us to defend these ideas with arms in our hands, we must fulfill a mission no less noble. United in single purpose, and acting together, it is our duty to apply our efforts to the realization and the reaffirmation in the public consciousness of our peoples of the idea of law and of the concept of justice, as opposed to the abuses of force and of violence.

Within the frontiers of our respective countries, it is for us to strengthen our democratic institutions, by purging them of faults and of objectionable practices. The fundamental principles of democracy are eternal, just as the principles of Christian morality are eternal. And, as the sins of men, however grave, can never justify denial of the Christian system of morality, neither can coercion and violence justify denial of the principles of democracy."

DR. MANUEL FERNANDEZ SUPERVIELLE
Dean of Havana Bar Association and President of Inter-American Bar Association

BAR ASSOCIATION NEWS

National Federal Bar Association

THE annual fall reception and dinner of the National Federal Bar Association was held at Washington, D. C., October 18, 1940. The reception preceded the dinner, at which President Heber H. Rice, presided.

Among the outstanding guests were members of the United States Circuit Court of Appeals for the District of Columbia—Chief Justice D. Lawrence Groner, Justice Justin Miller, and Justice Wiley Rutledge—and their wives. Other distinguished guests were: Dr. Manuel Superveille of Cuba, President of the Inter-American Bar Association, and Mrs. Superveille; Dr. Raoul Herrera-Arango, of the Cuban Bar Association, Second Secretary of the Cuban Embassy, and Mrs. Herrera-Arango; Mr. John T. Vance, Chairman of the Section on International and Comparative Law, ABA, and Mrs. Vance; Mr. William R. Vallance, Secretary General of the Inter-American Bar Association; Mr. George Maurice Morris, Chairman of the Tax Section, ABA; Mr. Fred W. Catlett, member of the Federal Home Loan Bank Board, and Mrs. Catlett; Mr. Henry I. Quinn, member of the House of Delegates, ABA, and Mrs. Quinn.

Judge Rutledge, who delivered the principal address, urged recognition of a common goal in democratic ideals among the different races and creeds in Americas.

Dr. Superveille spoke briefly in Spanish, and stated that he hoped to welcome the Federal Bar Association members to the first meeting of the Inter-American Bar Association, to be held at Havana on the week of March 24th next. His remarks were translated by Dr. Herrera-Arango.

JAMES C. VICKERS
President, Philippine Bar Association

American Bar Association (Philippines)

THE JOURNAL is recently in receipt of a report of the second annual meeting of the American Bar Association (Philippines), held in Manila, August 9, 1940. President George Rogers Harvey presided. Twelve members were present. The officers elected for the year 1940-41 are: President, James C. Vickers; Vice President, Claro M. Recto; Secretary-Treasurer, Robert L. Janda.

State Bar of Michigan

THE State Bar of Michigan held its annual convention at Lansing, September 19-21, 1940. Among the principal events were the legal institutes, mentioned below, a luncheon honoring the Michigan Supreme Court, an address by President Jacob M. Lashly of the American Bar Association, and finally a genuine old-fashioned ox-roast. Picture of the latter is presented below.

The meeting was presided over by President Julius H. Amberg. The report of the economic survey committee, whose purpose was to ascertain the facts about the economic status of the Michigan bar, attracted special attention. The facts of the survey and its conclusions and recommendations are embodied in a 22-page report which is available to persons interested by writing the State Bar of Michigan, Olds Tower, Lansing.

Three half-day legal institutes were conducted during the convention. An institute on Taxation was presided over by Fred G. Dewey of Detroit, second vice president of the State Bar. An institute on Insurance was presided over by Benjamin Kleinstiver of Jackson, chairman of the Committee on Insurance. An institute devoted to Administrative Agencies was presided over by by Dean Blythe Stason of the University of Michigan Law School.

The officers for 1939-40 were: President, Julius H. Amberg, Grand Rapids; First Vice President, Glenn C. Gillespie, Pontiac; Second Vice President, Fred G. Dewey, Detroit; Secretary, Leo I. Franklin, Detroit; Treasurer, Dean W. Kelley, Lansing.

HON. JACOB M. LASHLY, President of the American Bar Association, and HON. HOWARD WIEST, Justice, Supreme Court of Michigan, at Lansing meeting

Charlotte Engraving Co.

HAMILTON C. JONES
President, North Carolina Bar Association

North Carolina Bar Association

THE 42nd annual meeting of the North Carolina Bar Association was held at Blowing Rock, North Carolina, June 28, 29, 30, 1940. The meeting was attended by some 375 lawyers.

President Fred I. Sutton addressed the association on the subject "The Lawyer an Officer of the Court." Hon. Claude M. Dean, Clerk of U. S. Circuit Court of Appeals, 4th Circuit, addressed the association on the subject "Eighteen Months Experience with Rule No. 10 Regulating Records and Briefs on Appeal."

The association received twenty-one committee reports. The report of the Committee on the Rule-Making Power of the Supreme Court and the report of the Committee on the Judiciary were followed by lively discussion from the floor. As a result of the work of various committees an ambitious legislative program will be sponsored during the coming year.

The highlight of the meeting was a banquet held Saturday night fashioned along the lines of the annual banquet of the American Bar Association. Governor-elect J. Melville Broughton endorsed the association's program in a brief humorous address.

Officers elected for the year 1940-41, were: President, Hamilton C. Jones, Charlotte; Vice Presidents, I. C. Wright, Wilmington, Fred Coxe, Wadesboro, and Spurgeon Spurling, Lenoir; Secretary and Treasurer, Allston Stubbs, Durham.

West Virginia Bar Association

THE West Virginia Bar Association held its joint annual meeting with the Virginia State Bar Association at White Sulphur Springs, August 8-10, 1940. It was the first time the two associations had held a joint meeting.

The meeting, which was exceptionally well attended, was the fifty-fourth annual convention of the West Virginia Bar Association and the fifty-first annual meeting of the Virginia State Bar Association. (An account of the Virginia State Bar Association appears in the November, 1940, issue of the JOURNAL.)

The program included a joint reception for the two Associations, together with several joint sessions, and several separate sessions for each Association. Among the speakers for West Virginia were Hon. Haymond Maxwell, of the Supreme Court of Appeals and Hon. Claude M. Dean, Clerk of the U. S. Circuit Court of Appeals, 4th Circuit.

The officers of the West Viginia Bar Association for the year 1940-41 are: President, O. E. Wyckoff, Grafton; Vice Presidents, Henry S. Schrader, Wheeling; Keith Cunningham, Elkins; James H. White, Fayetteville; E. A. Marshall, Huntington; Lant R. Slaven, Williamson; W. C. Revercomb, Charleston; Librarian, Ralph D. Woods, Charleston; Secretary-Treasurer, Bernard Sclove, Charleston.

HERBERT G. NILLES
President, State Bar Association of North Dakota

Foster Studio

JOHN S. BATTLE
President, Virginia State Bar

Virginia State Bar

THE second annual meeting of the Virginia State Bar (being the integrated bar in Virginia as distinguished from the Virginia State Bar Association) was held in Roanoke, August 7, 1940. The secretary's report showed, as of July 1, 1940, there were 2,776 members of the bar in good standing in the Association. The meeting was presided over by President Samuel H. Williams. Officers for the year 1940-41 are: President, John S. Battle, Charlottesville; Vice President, Guy B. Hazelgrove, Richmond; Secretary-Treasurer, Russell E. Booker, Richmond.

R. E. BOOKER,
Secretary.

State Bar Association of North Dakota

THE JOURNAL is in receipt of an attractive booklet prepared for the annual assembly of the State Bar Association of North Dakota, held at Fargo, August 29-30, 1940. The main addresses were "Code Revision" by A. M. Kuhfeld; "Some Problems of Probate Law," Norman G. Tenneson; "Frazier-Lemke Bankruptcy Law," John J. Nilles; "Foreclosure of a Real Estate Mortgage in North Dakota," A. M. Kvello; "Problems Concerning Title and Abstracts of Title," Harrison A. Bronson. President Clyde Duffy gave his annual address at the first session. Officers elected for the year 1940-41 were: President, H. G. Nilles, Fargo; Secretary-Treasurer, M. L. McBride; Dickinson.

GEORGE L. REESE, SR.
President, State Bar of New Mexico

State Bar of New Mexico

THE sixteenth annual meeting of the State Bar of New Mexico was held at Albuquerque, September 27 and 28, 1940. Charles Fahy, now Assistant United States Solicitor General and formerly general counsel for the National Labor Relations Board, delivered the principal address on "The Work of Federal Administrative Agencies with Particular Reference to the National Labor Relations Act." Mr. Fahy practiced law in New Mexico for ten years prior to going to Washington.

The President, Judge Edwin Mechem, delivered an address on "Busy Thoughts of an Idle Lawyer." Mr. Justice Daniel K. Sadler, of the Mexico State Supreme Court, delivered an address on the subject "Observations on the Original Jurisdiction of Our Supreme Court.

Judge Sam G. Bratton introduced a resolution at the meeting as follows: "Resolved that we favor the establishment and maintenance of a law school in the University of New Mexico which will meet the requirements for approval of the American Bar Association and Association of American Law Schools." Considerable discussion was had of this resolution and on a vote it was carried.

The officers elected for the year 1940-41 are: President, George L. Reese, Sr., Roswell; First Vice-President, Everett M. Grantham, Clovis; Second Vice-President, A. K. Montgomery, Santa Fe; Secretary-Treasurer, Herbert Gerhart, Santa Fe.

Bar Association, City of Boston

"THE BAR BULLETIN" (of Boston) for October 1940, gives an interesting account of the year's work of the Bar Association of the City of Boston. The executive business of the association is conducted by the Council, which consists of the president, two vice presidents, the treasurer and secretary, three former presidents, together with 21 other members of the association, making a total of 29 members. The association has twelve standing committees. The report of the Council shows among other things that a "special committee on state bar integration" has been giving consideration to bar integration in Boston. The report of the Council says that "the report expresses neither approval nor disapproval of the principle of integration, but gives abundant information which will help each member of the bar to make up his mind on the question." The Council during the year decided to recommend that annual dues be reduced to the following amounts:

10 year and over members	$15.00
5 to 10 year members	8.00
3 to 5 year members	4.00
1 to 2 year members	2.00

The Bulletin also contains the reports of the Executive Committee and the Treasurer and the following committees: Admissions, Amendment of the Laws, Grievances, House & Library, Legal Education, Meetings, Patents, Publicity and Public Relations, and Unlawful Practice of the Law.

The officers for the year 1940-41 are: President, Frederic H. Chase; First Vice President, Daniel J. Lyne; Second Vice President, Willard B. Luther; Treasurer, Oliver Wolcott; Secretary, Talcott M. Banks, Jr.

Legal Notes on Local Government

THE JOURNAL has just received an attractive magazine with the above title. It is a quarterly journal published by the Section of Municipal Law of the Association, and edited by the School of Law, New York University. The October issue carries the reference "Vol. VI, No. 1." William C. Chanler, Corporation Counsel of New York City, is chairman of the Section; and Barnet Hodes, Corporation Counsel of the City of Chicago, is vice chairman.

There is a "Foreword" by Chairman Chanler; an account of the annual meeting of the Section at Philadelphia in September, by the Section secretary, Arnold Frye, of the New York City Bar; an address, "Grants in Aid—Possibilities and Problems," by Arthur A. Ballantine, of the New York State Bar. The greater part of the magazine (which runs to 80 pages) is taken up with a "Current Survey" of Case-law Literature and Legislation having to do with Municipal Law.

Altogether the magazine is one which should be of interest to "the 20,000 lawyers in the country" who it is said are "actively engaged" in problems of Municipal Law.

ROBERT W. UPTON
President, New Hampshire Bar

When the story about the New Hampshire Bar Association was printed in the September issue, p. 751, a photograph of Mr. Upton was not at hand. The other officers for New Hampshire, for the year 1940-41 are: Vice-President, Hon. Henri A. Burque, of Nashua, Chief Justice of the Superior Court; Secretary-Treasurer, Conrad E. Snow, of Rochester.

*Brazilian Lawyer Speaks at Philadelphia Meeting**

DR. DE FONTOURA, who represented the Bar of Brazil at the Philadelphia meeting, spoke extemporaneously before the House of Delegates, at the invitation of that body. From Philadelphia he was to proceed to Havana, as an official representative of his government, and from there was to go on another official journey to Bogota, Colombia. The following is a transcript of his remarks:

"Although my trip to this great country had other purposes, it is with great honor and pleasure that I take this opportunity to speak a few moments before the American Bar Association. I am very happy that this appearance before your body takes place in the historical city of Philadelphia, the cradle of North American independence. It has been my privilege to visit the sacred places which represent the traditions of this great country, some of which make of Philadelphia both a link with the past and a mavelous example of the present. Again the ideals of freedom in each country are ringing out. The Liberty Bell, which ever since the funeral of Marshall has remained able to peal in response to the high ideals, energy and moral strength of your country, until it reaches all men of good will for the enjoyment of peace, justice and freedom.

I am, like all of you, a member of the legal profession and, although I am an official delegate of the lawyers in my country, I can assure you that the Brazilian Bar is fully in agreement with your ideals of love of right and respect for law and justice, which is ever a characteristic of our profession. We are necessary to the full understanding of justice. A court is only such when it has counsel for the defense. That is why a great writer once said that there are good judges only where there are good lawyers.

One of the reasons you are gathered here is to make a comparative study of the law in various countries. Although I did not expect the pleasure of being at this meeting, I beg your indulgence for what I am about to say about the modern social laws of Brazil.

In less than a decade my country, thanks to the persevering, systematic and provident action of President Vargas, was able to create an almost totally new system of legislation intended to benefit the working classes, insuring their material welfare by extending to them a system and help under the form of a compulsory public service. Brazil has a more than adequate legislation covering the working class. My country has provided for fair treatment of labor by means of an equitable body of employers and employees. Our legal progress in this direction has been accomplished without bloody strife and without impeding the progress of the common effort on behalf of the country's prosperity. Recently we enacted a law establishing a minimum wage and providing for certain measures of housing comfort. We hope that through these new regulations it will be possible to improve still more the living conditions of our working classes, without conflicting, however, with the interests of business and industry. Undoubtedly my country feels the consequences of the world conflagration which is drenching three continents with blood, but the laws I have mentioned are enabling us to withstand the effects without any serious difficulties in our economic structure, our sources of production and our wealth. My idea in bringing our social laws before you was prompted because I feel that legislation of this type is one of the most interesting aspects of the law.

You are well aware of the fact that new world conditions since the World

*Address of Dr. J. Neves de Fontoura, of the Bar of Bazil, before American Bar Association, Philadelphia, September 12, 1940.

To Members of the American Bar Association:

While it is not possible for every member of the Association to engage actively in Bar Association work, every member can aid in furthering the activities of the Association by obtaining the application of at least one new member each year. A form for this purpose is printed below.

The Association's fiscal year is July 1 to June 30. Annual dues are $8.00 for lawyers who have passed the fifth anniversary of original admission to the bar, $4.00 for those admitted less than five years. Dues accompanying applications are computed on a pro rata quarterly basis for the fiscal year, and three-fourths of a year's dues should accompany applications presented between October 1 and December 30.

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Check to the order of American Bar Association for $..... is attached.

War set many precedents for social legislation. While combining some of the aspects of public and private law, social legislation forms today a third category which alters the old Roman dual doctrine and becomes a "tertium genus." Despite uncertainty as to the future, all indications point to a revival and a consolidation of juridical values.

I wish now to thank the American Bar Association for the honor it has conferred upon me by inviting me to this meeting. As a representative of the Brazilian Bar I would like at this time and in this historical city to plead for the necessity of closer relations between the nations of the American Continent. Pan American ties have never been any stronger nor more necessary than at the present time. The storm that is raging abroad, closer to us than ever because of the shortening of distance brought about by mechanical progress, makes it necessary for us in this Continent to observe a code of unity, friendship, defense and solidarity. We are twenty-one republican flags fluttering in the wind of two oceans. Through many years of contact from one end to the other in continent, we have found out that racial, lingual, temperamental or climatic differences are not an obstacle to the solidarity and mutual understanding of so many millions of human beings. Each republic has its own peculiarities, its needs and special problems and methods, and even its own complexes, but all of these differences disappear when we think in an American way. And to think American does not exclude the rest of the world but rather comprises all other countries in the same sentiment of mutual respect for the freedom of each nation, the same ideals of Christianizing the world by outlawing violence and conquest.

Since President Monroe made his famous declaration we have daily realized the value of his doctrine which more recently was made more concrete by the creation of a new International Institute as one of the results of the Havana Conference, which I had the honor to attend.

Your illustrious President Roosevelt, through his characteristic good neighbor policy among the nations of the Americas, took a new and decisive step to bring closer together the peoples of the New World which emigrated from the old, and by so doing he has greatly contributed to the increase of material, spiritual and political values.

Solidarity between the Americas does not depend, however, on the governments alone. It depends principally on the people themselves, which means to know each other, understand each other and get to like each other.

To conclude, I wish to testify to my admiration for the United States of America, for its greatness and majestic past, for its dynamic present and for the fateful part which it is undoubtedly to play in the future for the welfare of mankind."

WASHINGTON SERVICES TO MEMBERS

The Supreme Court Opinion Service will furnish at $1.00 each, copies of opinions by *airmail* as soon as available from the printer. The opinion usually may be had within 24 hours after the decision is announced. The Supreme Court's docket number and the name of the case should both be stated, if known. When these are not known, sufficient description of the case should be given so that it may be readily identified.

The Document Service is an additional service to members. It will furnish other current government documents, publications, and reports, available in Washington, on a similar basis, the base charge for each item requested being $1.00. To this will be added the cost of the document, when not obtainable free, and the cost of mailing; both of which, when known to the member, should be added to the $1.00 for each document and enclosed with the request. *Regular mail will be used in this service unless otherwise requested and extra postage added to the remittance.* It is not contemplated that formal bills will be rendered for cost of the publications and postage where these amounts being unknown, are not sent with the request; but the member will be advised of the amount due at the time the material is sent. Requests under both the above services, should be sent to the American Bar Association, 1152 National Press Building, Washington, D. C.; and all checks drawn to the Association.

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by **GEORGE W. THOMPSON**

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Author of "Wills," "Examination of Titles," "Abstracts," "Construction of Wills," "Real Property."

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A host of other newer questions resulting from more recent application of old principles are all treated fully and thoroughly. The text has been revised completely and expanded so that the scope of the new work has been increased by more than a third.

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In This Issue

Impeachment Substitute Not Favored—Our Washington correspondent has sent us an extended account (printed in this number) of the proceedings on the proposed bill for a different method of removing federal judges. The bill has been defeated.

Regional Conferences—The American Bar Association has been holding a series of what it calls "regional conferences" during the past few months. State and local bar associations send representatives, and local members of the House of Delegates are in attendance, along with members of various American Bar committees and of the Junior Bar Conference. Five southern States were included in a recent conference at Atlanta, and representatives from thirteen eastern States met at New York. Legal education, the relations of press, radio, and bar, unauthorized practice, institutes for lawyers, and many other topics of general interest were discussed. Both conferences are reported in this issue of the JOURNAL.

Pre-Trial—What they think of pre-trial procedure in the District of Columbia may be seen from an article in this issue of the JOURNAL.

Law Office Management—It is probably true that members of the legal profession ought to give more attention to office management. The JOURNAL prints in this number the first of a series of four articles on the subject, written by Reginald Heber Smith of Boston. They are aimed at the ten thousand law offices which are not very large, but which are in need of economical and efficient adminstration. The author has particularly in mind the law office outside the large metropolitan centers. All the principles and procedures recommended have been tested in actual law office practice.

Supreme Court Decisions—All decisions of the Supreme Court of the United States handed down on or after March 25, up to and including April, are reviewed fully, or summarized, in the present number. This has long been a feature of the JOURNAL.

State Delegate Nominations—The American Bar Association's annual meeting (at Philadelphia in September) is foreshadowed by the nominating petitions for State Delegates which have been appearing in the JOURNAL.

Georgia and the British Creditor—The plaintiff in the famous case of *Chisholm* v. *Georgia*, 2 U. S. 419 (1792), was a citizen of South Carolina, but the creditor in whose right the action was brought was Robert Farquhar, who seems to have been a subject (or at least a resident) of Great Britain. Did the State of Georgia urge this fact as a defense? Our Washington correspondent asks for help in solving this problem.

Books—Several recent books by or about lawyers, courts, and law are reviewed in this number. Mr. Armstrong poses some questions on English judicial administration, awarding praise and adverse criticism with a discriminating hand.—As in law the very old may possibly be also quite new, some medieval French criminal law will interest many readers.—A little pamphlet, written by Justice Murphy while he was Attorney General, has an appreciative notice.

The "Newer Jurisprudence" Has Plenty of Life—In this number the JOURNAL prints the second and concluding part of Professor Llewellyn's article which began as "a short paper in words of one syllable on what has been happening in Jurisprudence and what it means to practicing lawyers," and ended by being a lively and full account of the progress of legal thought over the last decade or two. This is a rare chance for our readers to bring themselves down to date on juristic thinking.

Arizona is Pioneer in Adapting Federal Rules—When the new Federal Rules of Civil Procedure had been drafted, a strong argument for their adoption was that a modern code of federal procedure would help greatly in the improvement and simplification of State practice acts and lead ultimately to agreement upon the chief items of a modern system of practice in the courts. This hope has already been fulfilled in one State, as told by a judge of the Supreme Court of Arizona in this number of the JOURNAL. This progressive State has gone further, and adopted also the code of criminal procedure recommended by the American Law Institute.

News of the Bar—What State and local bar associations are doing, may be seen from reports in this issue of the JOURNAL. There is a wide range in places and subjects of discussion.

Crime, Criminals, and Criminal Procedure—Some lawyers have succeeded in assuring themselves that the solution of the crime problem is simple: Be tough on the criminal; only silly sentimentality would suggest any other program. In a book review in this issue, E. W. Puttkammer points out that 95% of all prisoners leave prison sooner or later, and return to live in our communities: in other words, we have practically all of them on our hands again. A good parole system keeps them in prison till they may be let out safely, and then supervises them. "So long as it is wise to release an offender when, and only when, he is fit for release, to watch and supervise him after that release to see if he is worthy, and to return him to prison at once if he is not—so long as that is wise we shall have parole, because that is what parole is." (See review of La Roe's *Parole with Honor.*)

So much for the prisoner at the end of his prison career. Going further back, Federal Judge Grimson of North Dakota, in *Guilty!! Then What?*, asks readers of the Journal to consider the possibility of a more intelligent handling of young persons on trial for their first offense.

There is much to be said *pro* and *con* in a study of Criminal Appeals. Should we have them at all? If so, of what kind? The National Conference of Judicial Councils has sponsored a book on the subject, giving all sides (See Orfield's *Criminal Appeals in America*, reviewed in this issue of the Journal.)

Voice of the People—Members exercise the right of free speech by comments, adverse and otherwise, on articles appearing in the Journal.

Law-Suits and Verdicts—Two interesting local studies, reported in this number of the Journal, show the run of civil jury verdicts in Boston over the past ten years—how many for the plaintiff and how much awarded on the average, and the relation between the number of lawyers in Chicago and the number of suits filed. A chart brings out very clearly the points of the latter study. The Boston figures are shown in convenient tabular form.

Government Counsel—Attorney General Jackson points out the need of an impartial, dispassionate enforcement of the law, and the great opportunity for sincere and effective service of the public.

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In This Issue

The American Law Institute held its eighteenth annual meeting at Washington on May 16-18. The meeting is fully reported in this issue. Chief Justice Hughes' address, as usual, was the high spot of the meeting. There were reports of progress by Director Lewis and Judge Goodrich. Juvenile crime was the subject of a day's discussion, and the law of evidence was advanced on the Institute's agenda.

Judge Ross

Ross Prize Essay—The winning essay in the Ross Prize contest is printed in this number. The award this year is $3,000. The winner is Prof. Thomas Fitzgerald Green, Jr., of Athens, Georgia, and the subject "To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence."

Iceland and the Western Hemisphere—The ancient island kingdom has come into new prominence as a result of its indirect involvement in the European war. Prof. Sveinbjorn Johnson of the University of Illinois, who was born in Iceland, discusses international relation in this issue of the JOURNAL. Judge Gudmundur Grimson of North Dakota, also a native of Iceland, adds his views on the same subject.

Interpolations in Radio Broadcasts—The difficult position of a radio station when defamatory statements are made by speakers who depart from their manuscripts, is discussed briefly by Prof. Vold of the University of Nebraska, who thinks that the station's liability is clear.

Philadelphia and Our Annual Meeting—In this issue we print an article on Philadelphia, old and new. The annual meeting of the American Bar Association will be held in that city during the week beginning Monday, September 9, 1940. It is expected that the program will be announced in the July number of the JOURNAL. Indications point to a record attendance.

When May a State be Sued?—The early history of this problem has light thrown on it by researches in old newspaper files, reported in this issue in a note on *Chisholm v. Georgia*. Our Washington correspondent has been working this out from the records, and a Savannah, Georgia, archivist has given help.

Another "Regional Conference" in the South—Bar leaders from 5 southern States meet at New Orleans for mutual counsel.

Book Reviews—Some important books are reviewed in this number, including *Scott on Trusts*.

Woman and the Law—Our thought-provoking correspondent L. T. S. criticizes in this number what she calls "discrimination" and "prejudice" on the part of the public (both male and female) as to women.

New Managing Editor—Urban A. Lavery, the new managing editor of the JOURNAL, will begin service on June 1. A biographical sketch and picture are presented in this issue.

Washington Letter—Our correspondent in the capital writes of many things of interest developing there.

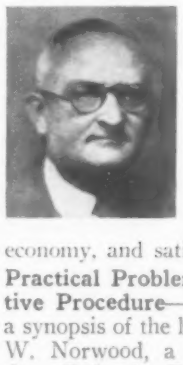
Constitutional Law—We give a brief account of the recent Washington conference.

Articles in Law Journals—Prof. Sears summarizes several of the principal articles in current legal journals.

Supreme Court Opinions—The great oil decision is reviewed in this number, with all the other opinions handed down by the Court to May 20.

International Law—Several important meetings on international law were held in Washington during the third week of May. The organizations concerned were the Section of International and Comparative Law of the American Bar Association, the Section (IX) of International Law, Public Law, and Jurisprudence of the Eighth American Scientific Congress (attended by learned men from the whole western hemisphere, under the auspices of the government of the United States), and the American Society of International Law.

London Letter—In the capital of the British Empire they still have thought for art and law. Our London correspondent tells us of the Temple Church, and of suggested improvements in reporting the decisions of courts.



Business Organization of a Law Office—Reginald Heber Smith gives the second instalment of his article on better office arrangements, promoting efficiency, economy, and satisfaction.

Practical Problems of Administrative Procedure—While this is not a synopsis of the larger work by John W. Norwood, a trial examiner for the Federal Trade Commission, which is to appear in book form, the article of Mr. Norwood's, printed in this issue, contains much of the substance, and the complete theory and method of direct application advanced in the book.

The article is devoted entirely to evidence and its reception.

Junior Bar—The various important activities of the younger members of the Association are reported in this number.

Professional Ethics—Judge Arant reports the findings of his committee made since our last issue.

Revision of Statutes in Florida—How some young lawyers started a movement that made statute books cheaper and better is told in an article in this issue.

Notes of Late Decisions of Supreme Court (May 20)

(*Supplementing Reviews and Summaries, pages* 515 *to* 530)

On Monday, May 20, the Supreme Court of the United States handed down eleven decisions. The review of those decisions must be deferred until the next issue of the JOURNAL but several of them are of considerable importance. These cases held as follows:

Borchard v. California Bank, No. 752—That the right of a bankrupt farmer to retain possession of his farm and postpone the foreclosure of the mortgage upon showing of reasonable probability of rehabilitation, is conditioned upon compliance with the procedure laid down in the Frazier-Lemke act.

Ex parte Bransford, Original—That a statutory three judge court was not necessary in a case where an injunction was sought on the ground that the operation of the statute produced an unconstitutional result but where the statute itself was not challenged as unconstitutional.

United States v. Bush, No. 613—That a proclamation by the President increasing the duty on certain commodities was "but one stage of the legislative process" and was not subject to review.

N.L.R.B. v. Bradford Dyeing Association, No. 588—That jurisdiction over a labor controversy existed although the volume of interstate commerce conducted by the company's plant was only about one per cent of the total business in that industry.

United States v. Chicago Heights Trucking Company No. 724—That the right of the Interstate Commerce Commission to regulate less than truckload shipments was within the power of the Commission whether or not individual shippers made complaint.

Sontag Chain Stores Company v. National Nut Company, No. 671—That one who used a machine covered by an original patent, but not covered by a reissue, was nevertheless properly made a party defendant in litigation charging an infringement under the reissue.

Cantwell v. Connecticut, No. 632—That a Connecticut statute which prohibited solicitation for religious, charitable, or philanthropic causes without approval by the Secretary of Public Welfare "as construed and applied," deprived the defendants of liberty without due process of law and was an interference with religious liberty.

Dampskibsselskabet Dannebrog v. Signal Oil and Gas Co., No. 662—That a maritime lien existed on account of the sale of fuel oil furnished for the operation of vessels.

Anderson v. Helvering, No. 682—That purchasers and owners of properties are taxable upon the gross proceeds derived from its oil production, notwithstanding the arrangement to pay over the whole or a specified portion of those proceeds to the operating company.

N. C. & St. L. Ry. Co. v. Browning, No. 789—A judgment of the Supreme Court of Tennessee which sustained an assessment of a railroad company's property under the state's *ad valorem* tax law, was affirmed.

Sunshine Anthracite Coal Company v. Adkins, No. 804—The Bituminous Coal act of 1937 was sustained against an attack based on constitutional grounds. It was held that the 1937 act was free from the defects of the predecessor act of 1935, and was valid and enforceable.

To Members of the American Bar Association:

We print below a membership application form for your convenience, in the event that you have a friend or associate whom you wish to propose for membership.

By special arrangement, applicants applying for membership during the remainder of the current fiscal year ending June 30th, who accompany their applications with a full year's dues ($8.00, or $4.00 if the applicant has been admitted to the bar less than five years), will be credited with the payment of dues to June 30, 1941 but will receive the perquisites of membership beginning May 1, 1940.

Application for Membership
AMERICAN BAR ASSOCIATION
1140 North Dearborn Street
Chicago, Illinois

Date and place of birth.....

Original admission to practice.....
State Year

Other states in which admitted to practice (if any).....

Bar Associations to which applicant belongs.....

.....

White ☐ Indian ☐ Mongolian ☐ Negro ☐

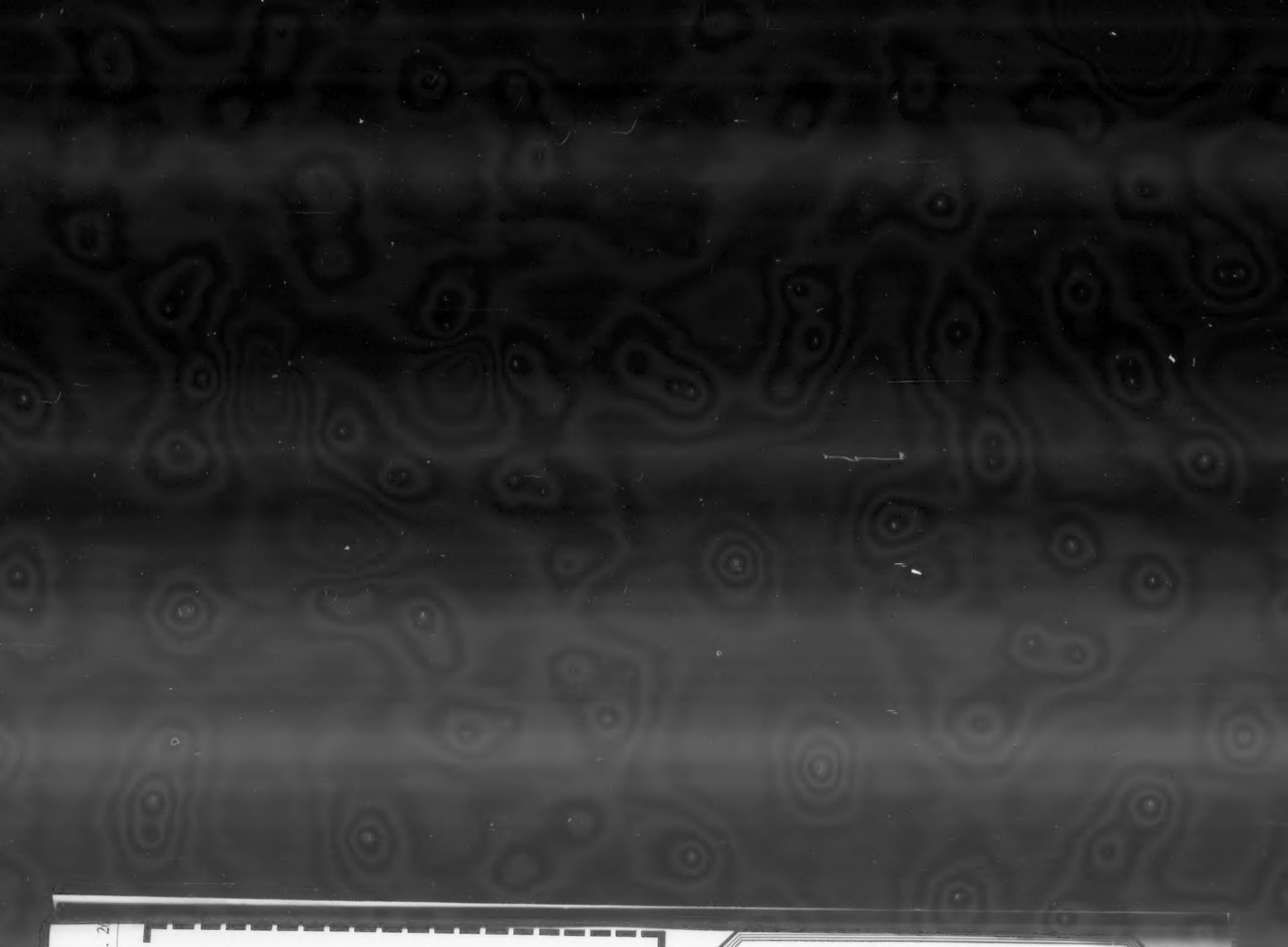
Name .....

Office Address .....
Street City State

Home Address .....
Street City State

Endorsed by .....Address .....

Check to the order of American Bar Association for $..... is attached.



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B. S., L. L. B. (MICHIGAN)

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In This Issue

Our Cover—The cover for this issue of the JOURNAL presents an unusual view of Independence Hall. This picture has been much admired by those interested in photography. If our members would care for a copy suitable for framing (without printing except for the words Independence Hall), we are prepared to furnish it at cost, on written request.

Justice Douglas' Article — The JOURNAL feels like congratulating itself on securing the article in this issue by Justice Douglas. Credit for arranging to get the article goes to the energetic member of our Editorial Board from New York City. We might tell you the story about tracking-down the Justice (who is on vacation in the State of Oregon) to get the copy for the printer; and then having to wire him to give the address a title—which it lacked. But that is a secret of the editorial sanctum.

Symposium on Philadelphia Meeting—There is such a thing as an editorial "Brain Flash," and there is also such a thing as a Flash-in-the-Pan. We are hoping that our Symposium on Letters in this issue will not be considered as falling in the latter category. The editorial force at least has been warmed by the response to our request for letters. If our members get a fraction of the pleasure out of reading the symposium letters which we have gotten, the idea will not have been in vain.

Foreign Affairs—Our Washington Letter on the Monroe Doctrine in the July issue was a real success. We had several requests for reprinting it. The article in this issue on Foreign Affairs is an effort to carry on the same idea of giving time-worthy articles about our National Government. The idea for this article is that of the Managing Editor, and he is responsible for its form and wording. But our Washington Correspondent did much of the digging up of the material, and is entitled to the credit for suggesting many of the items incorporated in the article.

Program for Philadelphia Meeting—We print herewith the Philadelphia program so far as it was available up to the date of going to press. In view of the fact that the full "Advance Program" will be in the hands of members before the Philadelphia meeting, the Program will not be re-printed in the September issue.

Advertising—The JOURNAL is engaged in making a survey of its advertising problems. The chief problem is to get more advertising, and the first step is to try to recover the advertising income of a decade ago. We are glad to report that the survey, so far, indicates distinctly optimistic prospects—provided alert action is taken by the JOURNAL, and provided also that our members help and sustain us by making the JOURNAL a good advertising medium.

Dean Harno's Letter—It is rare these days to find anybody writing about the Philosophy of Jurisprudence. It is even more rare to find it soundly and beautifully discussed as in Dean Harno's letter. The Dean had no intention of publishing his letter until we urged him to grant us permission to do so. We hope our readers agree as to its unusual message to the profession.

Conscription by the Editor—The doctrine, or practice, of Conscription is growing popular in the world, and seems to be effective in many fields. The Editor has in mind putting that doctrine into force for the purpose of securing suitable articles for the JOURNAL. Already he has given notice to a number of especially qualified writers (who never would themselves have volunteered) that they are expected within the year to get into the service by way of producing a good article. General notice is hereby given that the Conscription Idea will be extended from time to time, as the good of the JOURNAL may require.

Pardon Us, But—The following letter speaks for itself. It is of course an "Orchid." Perhaps next time we will have to print an "Onion."

Cape Girardeau, Missouri
July 8, 1940

Editor, ABA JOURNAL:
Dear Sir:

Since I became a member of the American Bar Association in 1923 I have received and with reasonable consistency read the American Bar Association Journal. I have saved every issue, and have a system of index references to the articles that have appeared on subjects in which I am particularly interested. The JOURNAL has, therefore, become a part of my office and library equipment, somewhat comparable in usefulness for reference purposes to the Reporter System.

Although I have made extensive use of the JOURNAL, and have found it often of much assistance and inspiration, I do not recall that I have ever written you a single word expressing my gratitude for your substantial contribution through the JOURNAL to my personal and professional career. For these omissions I ask your pardon and now offer a word of grateful appreciation for the two editorials in the July number of the JOURNAL, on "Lawyers and Their Home Communities," and "Lawyers and the Art of Living." There is something as refreshing and reassuring and challenging in these editorials as one finds in the crisp cool breeze of an autumn day.

These editorials stimulated in me an idea I am bold enough to suggest to you. For these days of stress and tribulations, while the ramparts of human liberty are being stormed, would it not be wise for us to get a perspective of the age-long fight for freedom? Could not this be done through a section of the JOURNAL, carried on through a period of perhaps a year, under some fitting title, like, "Landmarks in the Progress of Human Freedom."

Lawyers of distinction could contribute to different phases of the general subject, each one producing the result of extensive authentic research. One article could tell the complete story of Magna Charta. As a part of that article you might include a photostatic reproduction of the instrument, or a part of it. Another article could tell, in a similar manner, the story of the English Bill of Rights. Another could tell the story of the Declaration of Independence, and others could tell the story of the Constitution. I am sure that you could enlist the services of able and distinguished workmen on a task like this. Altogether, the collection would present a great panorama that should swell the pride of every free man and inspire hope in all of those to whom freedom is denied.

Very respectfully yours,
RUSH H. LIMBAUGH.

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INDEX TO ADVERTISERS

In This Issue

Our Cover—The cover for this issue speaks for itself. The Western Hemisphere has suddenly become a symbol of Democracy. Several articles in this issue make the cover both cogent and timely. It represents the latest development in the art of scientific photography. The globe was furnished through the kindness of Rand-McNally & Co. of Chicago.

Conscription and the Constitution—The Journal feels that in publishing the article "Legal Basis for Conscription," it is rendering a service to the public good. The Judge Advocate General of the Army evidently feels the same way. In conference with the Journal representative, when the article was planned, he said the opportunity of presenting the law and the facts on this important question was most welcome and timely; because inquiries to his office indicated that there was a blind-spot in the public mind about the legal and constitutional phases of this subject. We believe our readers will find the article interesting, authentic and unbiased.

Letters to the Editor—In the July issue we said: "Have you been noting the increased volume of Letters-to-the-Editor in the daily press? It always happens at times like these when people are deeply moved. Newspaper editors gloat when reader-letters increase. We would like to gloat! How can we know whether we please you (or irritate you) unless you tell us. It's **your** magazine. Have you any ideas?" The response to our request has been gratifying. Some of the letters have been hat-band-busters; a few have been definitely deflationary in that respect. We say again:

"It's **your** magazine. Does it suit you?"

First American Law-book—The picture in this issue of the first American law-book, printed in Mexico in 1563, deserves some thought. It touches the quick of our Anglo-American self-esteem. Johannes Gutenberg had discovered the art of printing only 100 years before that date. Coke wrote his **Institutes** about 1630. The first law-book published in the United States, of which any copy now exists, was the "Massachusetts Code," printed in Cambridge in 1648.

Memorabilia—A few days ago we had a pleasant visit from the gentleman who might properly be called "Editor Emeritus" of the Journal, Mr. Joseph R. Taylor. He presided over the destinies of the present Journal from its birth in 1920 to November 1939. After some urging he grew reminiscent and described the early days with a proud and fond glint in his eye. He related some of the unwritten history of the Journal's early days. His story is important, since it cannot be duplicated. A record of his comment should be made. He told us in substance as follows:

The Executive Committee of the Association, in April 1920, determined that something should be done about a proposed monthly Journal. Previously the magazine had appeared for about 5 years as a quarterly. It is interesting to know the reasons which impelled the bringing out of the new magazine. The resolution of the Committee which directed the bringing out of the new Journal, is set forth in the first issue, of September 1920. The resolution recites that the changes in the character of the publication were made—

> "To the end that it may be more attractive, more interesting to members of the Association, and to the Bar generally, and if possible a more powerful adjunct of the Association in respect of increasing the membership and interests of the Association."

The first monthly issue of the Journal comprised 64 pages. The Editor-in-Chief was the late S. S. Gregory of Chicago. [His son Tappan Gregory was President of the Chicago Bar Association, 1939-40.] He died within a month after the venture he had worked out was produced. He was succeeded as Editor-in-Chief in February 1921 by the man who still retains that distinction.

A "Dummy" of the new Journal was prepared in advance and submitted to the committee for approval, before publication. It is bound at the front of the official "Volume VI" of the Journal, and is a prized record of the Editorial Sanctum. In describing the experimental work before actual publication, the September 1920 issue says:

> "The new Journal had to be created, the method largely being to look over the entire field of legal publications, and decide what features appeared best suited to aid in expanding the professional interest and influence of the Journal. The fact that it was the official publication of the Association, and must not lose that character, was of course kept in mind; in fact was the point of departure for the plan."

It is interesting to know that the name of the Journal has been changed somewhat from that first decided upon. The cover of the first issue had a conventional design for a border and carried the title—

Journal
Issued by
American Bar Association

The type chosen for the title, for the first issue, known as old Roman, is the same as that still used. It contained the characteristic letters "V" and "R."

The launching of the new venture, so far as management was concerned, "was delegated to" the late James Keely, who was then a leading Chicago newspaper publisher. Mr. Taylor had been selected as Managing Editor largely at the suggestion of Mr. Keely. He came into the work from the newspaper field, having had an extensive experience in editorial work on several Chicago newspapers. He had also studied law.

The first issue contains one unusual feature. It is a "Fable in Slang" written especially for Mr. Gregory by George Ade, entitled *The Attenuated Attorney Who Rang in the Associate Counsel.* It is illustrated by a sketch of the *Associate Counsel,* made especially for the Journal, by the noted cartoonist, John T. McCutcheon. The Journal proposes to reprint George Ade's "Fable in Slang" in a coming issue. We are glad to learn that the original of McCutcheon's cartoon is in the possession of Mr. Tappan Gregory, and we shall take pleasure in reproducing it also.

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In This Issue

Our Cover—The cover for this issue will bring back memories to many American lawyers who went on the pilgrimage to England, in 1924. It is intended as a part of our *Salute to the Bar of England*. The photograph here reproduced comes from the scrapbook of that trip owned by the JOURNAL. It is a beautiful leather-bound book made up in London, and presented by the English Bar to the JOURNAL as the representative of the American Bar Association. The picture was originally printed as a large illustration in the London Graphic of July 26th of that year. It has been reproduced by a photographic technique which involves the latest scientific and artistic developments in photography. The details of the picture are brought out even more clearly than in the original. Reproductions of this picture, suitable for framing could be furnished at a reasonable cost if a sufficient number of our members are interested.

The caption of the original picture is worthwhile repeating. It reads:

Westminster Hall Welcome to American Lawyers. The JOURNAL scrapbook contains a full account taken from the English papers of the trip to England. A detailed description of the particular event shown on our cover appears in the ABA JOURNAL for August, 1924.

Salute to England—In our July issue we carried a Salute to the Bar of France. In this issue we pay our respects in a similar way to the lawyers of England. On another page we give some explanation of the ties which bind American lawyers to England and to London and to Westminster Hall and to the Inns of Court. As a part of our gesture of friendship we set out on another page of the JOURNAL a reproduction of a beautiful etching of Pennell, showing one of the most famous buildings of the Inns of Court. We believe that the American lawyers almost to a man will feel honored in Saluting the English Bar in their time of struggle.

Interesting Personalities—Some of the interesting personalities who took a prominent part in the Philadelphia meeting and are prominently identified with this issue of the JOURNAL are described below.

L. W. Brockington, K. C., was the official representative of the Canadian Bar at the meeting. He was also the representative of the Canadian Bar at the Boston meeting of the Association some years ago. A leading Canadian lawyer, he is widely and favorably known in the United States as a brilliant orator. He is a member of the Winnipeg Bar, now stationed in Ottawa, at the Capitol, as special wartime assistant to Prime Minister MacKenzie King.

Solicitor General Biddle—Francis Biddle has had a distinguished career since his college days. After graduating *cum laude* from Harvard College in 1909, and *cum laude* from Harvard Law School in 1911, he became private secretary to Mr. Justice Holmes, in Washington. From 1912 to 1937 he practiced law in Philadelphia. His associates at the Bar there speak of him in the highest terms, as to his ability, his integrity, and his forthright liberal point of view. He was chief counsel to the Joint Committee to Investigate T. V. A., 1938-39; and was Judge, U. S. Circuit Court of Appeals, 1939-1940. He became Solicitor General in January, 1940. His article in this issue, "Freedom of Speech and Propaganda," will be read with wide interest.

Hon. Hatton W. Sumners — Congressman Sumners has been continuously in Congress from (Dallas) Texas, since 1913. He has long been chairman of the Judiciary Committee of the House of Representatives. He is particularly cherished by the lawyers of the country because the Act giving the Supreme Court its present Rule Making Power in Civil Actions is largely the result of his work. His important and stimulating appearance at the meeting in Philadelphia will long be remembered by those who heard him. His talk, which is given in this issue, is of wide interest to the profession everywhere.

George Wharton Pepper—As one of the four speakers at the annual dinner, George Wharton Pepper, made a brilliant and scholarly talk. He has practiced law in Philadelphia with great distinction for fifty years, and is one of the most active leaders of the Bar in his city and State. Among his other distinctions he is a former Senator from Pennsylvania, a former Republican National Committeeman, and is a Trustee of the University of Pennsylvania.

The Open Forum—One of the significant features of any ABA convention is the spirit of true democracy which inheres in its proceedings. The Philadelphia meeting gave a special proof of this fact, by the effectiveness with which the Open Forum was used. Every individual member attending an annual meeting of the ABA has a full opportunity to present any matter, by way of written resolution, and have it heard and discussed by the Assembly. We comment on this point both in an editorial and in the running account of the Assembly proceedings.

Stare Decisis—This is a topic which is occupying the attention of many lawyers today. The article in this issue by John C. Gardner, of the Bar of Scotland, compares the American doctrine of *stare decisis* with related doctrines in England and Scotland. His temperate and scholarly discussion of a subject not too well understood in this country, should be of special value to our own Bar. Mr. Gardner is a well-known writer on legal topics in England and Scotland, and has the added charm of an attractive style.

Assembly Action at Philadelphia—We present in this issue a detailed narrative of the Assembly proceedings at the Philadelphia meeting. A stenographic record was kept by a famous convention reporter. The account in the JOURNAL is an abstract of the authentic record, made by a seasoned veteran of the Association's meetings, who justly calls himself "an old cow-hand," so far as Associaion affairs are concerned. Who is he? Well that's a secret of the Editorial Sanctum.

Watch for November Issue—As we state in this issue, about one half of the "story of the annual meeting" will appear in November. It has taken hard work and speed to get the present issue to the printer in less than two weeks after the meeting adjourned. We trust our readers will understand this and overlook any "E. and O. E." as the brokers say on their monthly statements.

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THOMPSON on REAL PROPERTY

[PERMANENT EDITION]

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B. S., L. L. B. (MICHIGAN)

Author of "Wills," "Examination of Titles," "Abstracts," "Construction of Wills," "Real Property."

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In This Issue

Supreme Court Decisions—With this issue we resume the Review of Recent Supreme Court Decisions. The story of this department in the JOURNAL is worth telling. The present Editor-in-Chief was appointed in January, 1921. The February, 1921, issue of the JOURNAL contained his first review of Supreme Court cases. In another month this feature of the JOURNAL will have appeared continuously for twenty years under the same editorship. That is a record that deserves being noted. This department long ago became an institution with the JOURNAL and with a host of lawyers throughout the country.

There are three important Supreme Court opinions reviewed in this issue. One of the Labor Relations cases places a limit on the authority of the Board. (*Republic Steel Corporation v. National Labor Relations Board*). The authority of the Board to compel the employer to return to the Public Authorities, money paid to strikers on relief, is denied. In another opinion, the binding effect of judgments in class-suits as *res judicata* on other members of the class is limited to those of the class which have been actually given an opportunity to appear in the case or who were in a real sense represented therein by others. (*Hansberry v. Lee*). In another case the exemption of income derived from government obligations (Farm Loan Bonds) was declared to be limited to the interest received, and it was declared that income did not extend to gains realized from their purchase and sale. (*United States v. Stewart*).

Our Cover—The covers of recent issues of the JOURNAL have been intended to carry some message in themselves. The globe of the world on the September cover called attention to the wide interest in what may be called "Hemisphere" events. The picture of the American Bar in Westminster Hall on the October cover emphasized the bond between lawyers in America and their brethren in England. The reproduction of "Magna Carta" on last month's cover signified the Anglo-American devotion to individual liberty. In this issue, which comes out just before Christmas period, we come back home, so to speak. The building which houses it is peculiarly the "household" of all American lawyers and for this reason the cover is suitable for this time of year.

John W. Davis—The JOURNAL takes pride in presenting "The Argument Of An Appeal" in this issue. John W. Davis needs no introduction to any lawyer in the American or English Bar. A generation ago he was already famous as one of our ablest Solicitor Generals because of the way in which he argued so many cases before the Supreme Court. In thanking him for the article, our Editor-in-Chief said:

> "What we need (in the JOURNAL) in greater proportion is material from which the bar at large can reap the advantage of the experience and wisdom of their elders. In that category and on the particular subject, I have seen nothing more valuable than your article."

Lawyers and Law Books—Any lawyer who has had a wide opportunity to get the point of view of the profession about buying books and using law libraries, knows that the law-book situation is one of the major difficulties confronting the Bar in the United States. In the matter of Reports, alone, the shelf-room required for them, as well as their cost, in the average law office, has about doubled since about 1915. The increased bulk of Encyclopedias and Digests in the same period has been even greater. The problem, however, has its optimistic side. The "curve" of annual reported decisions, which steadily mounted on the graph for more than a century prior to about 1920, has since that date leveled-off to a constant figure of about 20,000 reported decisions per year. It is with the lawyer's interest in these matters in mind that the article "Law Books and the Law" in this issue has been prepared.

Our London Letter—Our last London Letter, in the October issue, attracted wide attention. It was copied in part by the *Chicago Daily News*, and by other papers. The Letter in this issue is of even greater significance and interest. It is accompanied by a personal note, which we give at the head of the main Letter. In the years to come these London Letters, written during the bombing of London, are likely to become real historical records.

Nationality Act of 1940—Every lawyer has something to do from time to time, with questions of Naturalization. The story in this issue of the Nationality Code of 1940 will be read with interest, not only by lawyers, but by many laymen. Teachers and students of civics, social workers, and all persons interested in Governmental affairs should find something of interest in this well-written article. In line with the JOURNAL's policy of getting experts to write on special topics, this article has been prepared by an acknowledged authority in its field.

The "Insurance Forum"—One of the topics which attracted wide interest at the Philadelphia meeting in September was the so-called "Insurance Forum." The JOURNAL has had numerous letters commending that discussion of the important subject of Insurance regulation, and urging that it be printed in full. We have accordingly reserved the addresses there given until they could be printed together, in a single issue. The addresses which are set out in this issue may justly be said to give what may be called "both sides" of this interesting debate.

Book Reviews—The Book Review section of the JOURNAL has been in charge of the same editor for more than a decade. It can fairly be called one of the best book-review sections in any law journal in this country; and also one of the significant departments of the JOURNAL. Book reviews are looked upon with a certain scorn, by many readers. They are what Hamlet called "Caviar to the general." But that point-of-view really cheats its holder out of a good deal of pleasure as well as considerable wisdom. Book reviews may become real literature in themselves, as Macaulay and Robert Louis Stevenson have proved. No lawyer, for example, can read the review in this issue of Judge Knox's book without a feeling of pride in the profession chiefly because of the author of the book, but also because of the author of the review.

In General—The JOURNAL receives a considerable number of letters about the articles which it contains. They guide us in selecting material for future issues and are a good barometer of reader-interest. Most of the letters are commendatory. But some of them are critical, and a few are strongly so. But they are all in good temper and seek a common end—a better JOURNAL. We are anxious to know what our readers think. We welcome their comments and suggestions.

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